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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PRIVATE FIRST CLASS,
United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

STEPHEN D. SMITH
Colonel, Judge Advocate General's Corps (JA)
United States Army
Chief, Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(703) 756-0583
Counsel of Record

and

JAMES H. WEISE
Lieutenant Colonel, JA, United States Army

FRAN W. WALTERHOUSE
Major, JA, United States Army

ROY H. HEWITT
Captain, JA, United States Army

DAVID L. THOMAS
Captain, JA, United States Army

ALISON L. BECKER
Captain, JA, United States Army

December 1993

82 pp

QUESTIONS PRESENTED

I

Whether a military commander, who is charged with the administration of justice in his unit, can provide a "neutral and detached" judicial review of pretrial confinement proceedings as required by the Fourth Amendment to the United States Constitution and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

II

Whether the Court of Military Appeals violated the doctrine of separation of powers under the United States Constitution when it impermissibly interfered with the power of the President of the United States to establish a pretrial confinement review scheme in Rule for Courts-Martial 305(i) under the mandate of *Gerstein v. Pugh*, 420 U.S. 103 (1975).

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Wesley M. Rexroat, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 38 M.J. 292 (C.M.A. 1993) (Appendix A). The opinion of the United States Army Court of Military Review is reported at 36 M.J. 708 (A.C.M.R. 1992) (*en banc*), (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on September 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part:

> *Article I, Section 1.* All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> *Article I, Section 8.* The Congress shall have Power . . . To constitute Tribunals inferior to the Supreme Court . . . To raise and support Armies . . . To make Rules for the Government and Regulation of the land and naval Forces . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . .
>
> *Article II, Section 1.* [1] The executive Power shall be vested in a President of the United States of America.
>
> *Article II, Section 2.* [1] The President shall be Commander in Chief of the Army. . . .
>
> *Amendment IV.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 27 and September 16, 1991, Private First Class [hereinafter PFC] Rexroat was tried at Schofield Barracks, Hawaii, by a general court-martial composed of officer and enlisted members [hereinafter the jury].[1] Private First Class

[1] Court-martial members are analogous to jurors.

Rexroat pled guilty and was convicted of attempted larceny, two counts of absence without leave, and forty-one counts of uttering checks without sufficient funds, in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] arts. 80, 86 and 123a, 10 U.S.C. §§ 880, 886 and 923a (1982), respectively. The jury sentenced PFC Rexroat to a bad-conduct discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the sentence.[2]

At trial, PFC Rexroat asserted that he was not afforded the prompt judicial determination of whether there was probable cause to justify extended pretrial confinement following his warrantless arrest because the determination, although conducted within forty-eight hours, was made by a military commander. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991). Private First Class Rexroat contended that a judicial determination had to be made by a military magistrate.[3] Manual for Courts-Martial, United States, 1984 [hereinafter M.C.M., 1984], Rule for Courts-Martial [hereinafter R.C.M.] 305(i). The military judge found that the military commander who conducted the pretrial confinement review, Lieutenant Colonel Randall, was a neutral and detached magistrate for purposes of the *McLaughlin* review.

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[2]The commanding general, who initially convenes the court-martial, is also the accused's first avenue of appeal and clemency.

[3]A military magistrate is a judge advocate appointed by The Judge Advocate General of the Army. The Military Magistrate Program is "an Army-wide program for review of pretrial confinement and the issuance of search and seizure authorizations, on probable cause, by neutral and detached magistrates." Military magistrates are judge advocates "empowered to direct the release of persons from pretrial confinement . . . on a determination that continued confinement does not meet legal requirements. . . ." Chapter 9, Army Regulation 27-10, *Military Justice*, Headquarters, Department of the Army, Washington, D.C., (22 December 1989). (Appendix D.)

On September 22, 1992, a three-judge panel of the United States Army Court of Military Review [hereinafter Army court] held that *McLaughlin* and R.C.M. 305(i) require that a military magistrate review a commander's pretrial confinement order within forty-eight hours of apprehension and subsequent confinement. The panel found that the President's intent in promulgating R.C.M. 305(i) was to comply with the requirements of *Gerstein.*

The government petitioned for *en banc* reconsideration on October 14, 1992; PFC Rexroat opposed the petition. The Army court granted reconsideration *en banc* on October 28, 1992, and affirmed its original holding on December 8, 1992. (Appendix B.) In the interim, the other service courts adopted the holding of the original panel in *Rexroat. United States v. Holloway,* 36 M.J. 1078 (N.M.C.M.R. 1993) (*en banc*); *United States v. Williams,* ___ M.J. ___ (A.F.C.M.R. 31 August 1993).

On January 6, 1993, at the request of the government, The Judge Advocate General of the Army certified three issues to the United States Court of Military Appeals pursuant to U.C.M.J. article 67(a)(2). The United States Court of Military Appeals, on September 29, 1993, reversed the Army court's decision. The Court of Military Appeals held that a neutral and detached commander could make the *Gerstein* probable cause determination and, if completed within forty-eight hours, the review would satisfy *McLaughlin.* (Appendix A.)

REASONS FOR GRANTING THE WRIT

This case presents the questions of whether the lower court's decision (1) deprives servicemembers subject to warrantless arrest and pretrial confinement of the protections of the Fourth Amendment guaranteed to nonmilitary citizens and (2) impermissibly usurps the Congressionally-delegated power of the President to establish procedures which comport with

the requirements of the Fourth Amendment under *Gerstein* and *McLaughlin*.

Facts

PFC Rexroat was arrested and detained at the Navy brig at Pearl Harbor, Hawaii, on June 26, 1991. He remained in custody until his commander ordered him into pretrial confinement on June 27, 1991. On June 28, 1991, within forty-eight hours of the warrantless arrest and confinement, a commander outside PFC Rexroat's chain of command, Lieutenant Colonel [hereinafter LTC] Randall, conducted what the government contends was a probable cause review of PFC Rexroat's pretrial confinement and determined that continued confinement was justified.[4] On July 3, 1991, PFC Rexroat's commander reviewed his decision to place PFC Rexroat into pretrial confinement and prepared a memorandum setting out his reasons for continuing the confinement.[5] On the same day, seven days after PFC Rexroat's confinement began, a military magistrate conducted a pretrial confinement review and determined that continued confinement was warranted.[6]

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[4] From the record of trial, (R. at 187), LTC Randall's probable cause review consisted of a briefing by someone from the prosecutor's office followed by his decision to retain PFC Rexroat in confinement. It is unlikely that this Court's opinions in *Gerstein* and *McLaughlin* contemplated such a procedure.

[5] R.C.M. 305(h) requires that the commander of the person in pretrial confinement review the confinement within 72 hours and if pretrial confinement is continued, prepare a memorandum setting out the reasons for the decision to continue confinement.

[6] Under the Rules for Courts-Martial, failure to provide the required prompt judicial review mandated by *Gerstein* and *McLaughlin* subjected PFC Rexroat to five days of illegal pretrial confinement for which he is entitled to credit against his sentence to confinement. Even if PFC Rexroat should complete serving his sentence before this appeal is complete, he would be entitled to the return of the equivalent of five days

Gerstein and McLaughlin

This Court expanded its view of Fourth Amendment seizure protections to include pretrial confinement in *Gerstein*, declaring that "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the *Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.*" *Gerstein*, 420 U.S. at 114 (emphasis added). This review must be done promptly after the accused has been apprehended and placed into confinement. *Id.* The person conducting the review must be neutral and detached, and cannot have a prosecutorial or law enforcement role. *Id.* at 112, 118; and *accord, Johnson v. United States*, 333 U.S. 10 (1948); and *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). The Court of Military Appeals found *Gerstein* applicable to the military in *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). In 1984, the President, in promulgating R.C.M. 305(i) to be the *Gerstein* review, determined that the review "shall be made by a neutral and de-

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of forfeited pay and allowances as recompense for the five days of illegal confinement. The issues in this case are not moot.

Additionally, as this Court noted in *Gerstein*:

> Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly 'capable of repetition, yet evading review.'

Gerstein 420 U.S. at 110, n.11.

Finally, it should be noted that there is no established procedure in the military justice system of appeals to certify PFC Rexroat as a representative of a class.

tached officer appointed in accordance with regulations prescribed by the Secretary concerned [i.e., the Army Military Magistrate Program]." R.C.M. 305(i); M.C.M., 1984, R.C.M. 305(i) analysis, App. 21 at A21-16 to 17; AR 27-10. In *McLaughlin*, this Court articulated its belief that if the *Gerstein* review is done within forty-eight hours of arrest and confinement it will normally meet the promptness requirement. *McLaughlin*, 111 S. Ct. at 1670.

The Issues

Judicial Determination by a Neutral and Detached Magistrate

The key issue in this case is whether a probable cause determination by a military commander provides the Fourth Amendment protection of a judicial review by a neutral and detached magistrate contemplated by this Court. Impacting on this issue is the fact that the Presidentially-established procedures for review of pretrial confinement authorize **only** military magistrates to make the probable cause determination.

The meaning of neutral and detached is well settled. In *Shadwick, supra*, this Court addressed the constitutionality of clerks of the municipal court issuing arrest warrants for violations of city ordinances. The opinion provides an overview of this Court's past decisions and defines the neutrality and detachment required of a "judicial officer" or "magistrate."

> Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. . . . [no] affiliation . . . with prosecutors or police. . . . [no] connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires. . . . [the clerk in this case is] removed from

> prosecutor or police and works within the judicial branch subject to the supervision of the . . . judge.

Id. at 350-351.

This standard is clear and has normally been followed by the Court of Military Appeals. In 1982, the court opined that only military judges, military magistrates, or officers who were not involved in law enforcement could serve as pretrial confinement reviewers. *United States v. Lynch*, 13 M.J. 394, 397 (C.M.A. 1982). In *Lynch*, the court found that both the staff judge advocate and the brigade commander were disqualified from serving as reviewers, noting that the former is the chief prosecutor under *United States v. Harlin*, 7 M.J. 399 (C.M.A. 1979),[7] and the latter is involved in a law enforcement role under *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981). *Lynch*, 13 M.J. at 396-397, 397 n.2.

It is well settled that commanders are "law enforcement officials" within the command. *See United States v. Ezell*, 6 M.J. at 317-318 ("Indeed, no official in the civilian community having similar combined functions [as the military commander does] could qualify as a neutral and detached magistrate under Fourth Amendment jurisprudence."), and *Stuckey*, 10 M.J. at 359 ("A military commander has responsibilities for investigation and for law enforcement that a magistrate does not possess.") and at 361 ("It seems perfectly clear that a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate. . . .' "). *See also United States v. Sharrock*, 32 M.J. 326, 333 (C.M.A. 1991) (S.J. Everett, concurring in part and dissenting in part) (*citing with approval, Stuckey*, 10 M.J. at 361) ("A commanding officer cannot be equated to a magistrate. . . ."); M.C.M., 1984, R.C.M. 305 analysis, App.

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[7] *See also Coolidge v. New Hampshire*, 403 U.S. 433, 91 S.Ct. 2022 (1971) (individuals who perform prosecutorial functions cannot be neutral and detached magistrates for purposes of the Fourth Amendment).

21 at A21-15.[8] The Court of Military Appeals' decision in this case that commanders can act as neutral and detached magistrates under the Constitution to conduct a *Gerstein* judicial review is at odds not only with these prior rulings[9] but with this Court's language in *Shadwick*. *Shadwick* makes it clear that neutral and detached means that the person's **position** is neutral and detached from law enforcement and prosecution, **not** that the person is neutral and detached from a particular case. The Court of Military Appeals' interpreta-

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[8] *United States v. Lynch, supra*, held that officials with a law enforcement function are precluded from serving as magistrates. Commanders, according both *Ezell* and *Stuckey*, inherently function in those roles. Hence, *Lynch* concluded that the special court-martial convening authority, a brigade *commander*, was *per se* disqualified from being a magistrate for purposes of *Gerstein*. 13 M.J. at 296-97.

[9] The opinion is based on a misunderstanding of the purpose of the various procedures established under R.C.M. 305, (Appendix C), and fails to address the impact of the decision in several critical areas. First, the court fails to explain how "the commander's initial probable-cause determination under RCM 305(d)" can satisfy *Gerstein* when that determination is the one which places the accused into pretrial confinement and is made by the commander acting in a law enforcement role. Second, in holding that the seventy-two hour review *by the confinee's commander* mandated by R.C.M. 305(h) would satisfy *Gerstein* "if the commander is neutral and detached," the court again fails to explain under what circumstances a commander can be neutral and detached while reviewing his or her own decision to confine a soldier. Next, the court fails to explain what authorizes a commander outside the chain of command, as occurred in this case, to conduct the review under R.C.M. 305(h) when the plain language of the rule requires that it be done by the commander of the prisoner. Finally, the decision fails to take into account the fact that a commander outside the chain of command, LTC Randall in this case, has no authority to release a pretrial confinee. R.C.M. 305(g) authorizes only the commander of the prisoner, the person authorized to conduct the R.C.M. 305(i) review [a military magistrate] and, once charges have been preferred, the military judge, to direct release from confinement. In fact, releasing a prisoner without authority is an offense under U.C.M.J. art. 96, 10 U.S.C. § 896.

tion of "neutral and detached" is akin to one which would allow police precinct commanders in the civilian community to serve as magistrates in neighboring precincts.

The Court of Military Appeals reached its decision in this case based upon the rationale in its previous decisions regarding whether a commander could be neutral and detached in granting a search authorization under presidential authority. The court found "no reason" to treat pretrial confinement probable cause determinations any differently than those involving searches. *See generally, Ezell, supra.* The court reasoned, in essence, that because a commander can be neutral and detached for the probable cause determination in search cases, he can be neutral and detached for the purposes of pretrial confinement reviews. This analogy is flawed.

In *Ezell,* the Court of Military Appeals declined to find commanders *per se* disqualified to act as neutral and detached magistrates for search authorizations. It ruled that there was a special exception to the Fourth Amendment's "neutral and detached magistrate" requirement which allowed commanders to grant search authorizations; namely, specific presidential authority pursuant to Manual for Courts-Martial, United States, 1969, Paragraph 152, now M.C.M., 1984, Military Rule of Evidence 315. In this case, however, there is no analogous special exception. In fact, the President, by delegation of authority to the Secretary of the Army, specifically designated military magistrates, not commanders, to review pretrial confinement. Following the precedent of the search cases, therefore, the Court of Military Appeals should have deferred to Presidential authority and applied R.C.M. 305(i).

In *Stuckey,* another search case relied on by the court, the Court of Military Appeals recognized that a commander's authority to grant search authorizations has never been equated with the judicial determination which comes within the contemplation of the warrant clause of the Fourth Amendment. *Stuckey,* 10 M.J. at

360; *see also Gerstein*, 420 U.S. at 114. "It seems perfectly clear that a military commander—no matter how neutral and impartial he strives to be—cannot pass muster constitutionally as a 'magistrate' in the strict sense." *Stuckey*, 10 M.J. at 361. Instead, the constitutionality of a commander's authority to grant search authorizations rests solely on the reasonableness of such a search within the context of military society. *See United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992), *citing Goldman v. Weinberger*, 475 U.S. 503 (1986).

Review of the pretrial confinement of military personnel offers no unique circumstances or military custom requiring distinction from civilian society. The commander need not stop and seek judicial approval before confining a soldier but may do so upon determining the existence of probable cause. Soldiers in pretrial confinement are generally confined in facilities where there is easy access to a military magistrate who can perform the *Gerstein* review. Moreover, those rare circumstances in which military exigencies prohibit a military magistrate from reviewing the pretrial confinement of a soldier within forty-eight hours simply support departure from the forty-eight hour ceiling of *McLaughlin*, 111 S.Ct. at 1670. They do not justify abandoning the call for judicial review.

The President's *Gerstein* review under R.C.M. 305(i) can be performed any time after confinement. Accordingly, those completed within forty-eight hours satisfy the mandate of *McLaughlin*. Those occurring after forty-eight hours without articulated exigencies do not meet the *McLaughlin* mandate. Instead of applying this simple standard, the Court of Military Appeals misapplied the mandate of this Court in *Gerstein* by endorsing a "non-judicial" review of pretrial confinement. The court's apparent disregard of the clear intent of the President in establishing a *Gerstein* review under R.C.M. 305(i)[10] violates the doctrine of separation of powers.

[10] Petitioner notes that the qualifications of military magistrates under the Army Military Magistrate Program are in accord with the qualifications for federal magistrates under 28 U.S.C. 631 *et seq.*, and, therefore,

Had the Court of Military Appeals followed the rationale advanced by its own opinions, it would have determined that PFC Rexroat was illegally confined for five days and affirmed the Army court's opinion. Instead, it disregarded its own case law and invalidated the President's clear intent in violation of the doctrine of separation of powers.

Separation of Powers

The concept of separation of powers lies at the very heart of our republican form of government. In the seminal case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court held that the President of the United States could not seize and operate the nation's steel mills for in doing so he was acting in the capacity of a lawmaker. It is the role of Congress, not the President, to make laws. As a result, this Court found that the President's actions violated the doctrine of separation of powers. *See also New York v. United States*, 112 S.Ct. 2408 (1992) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another. . . ."); *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

This Court held in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), that one branch can delegate power to another branch, but the delegation is limited and controlled by the delegating branch. *See also Mistretta v. United States*, 488 U.S. 361 (1989).

The United States Constitution grants Congress power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST., art. 1, § 1. Under this constitutional authority, Congress passed the Uniform Code of Military Justice. 10 U.S.C. § 801 (1950, 1982). Under

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military magistrates could serve as judicial officers within the meaning of *Gerstein*.

U.C.M.J., art. 36, Congress delegated to the President limited powers to implement the Code. Specifically, the President was given the Congressional power to proscribe "[p]retrial, trial, and post-trial procedures." U.C.M.J., art. 36.[11] The United States Court of Military Appeals has recognized that the President has authority to promulgate Rules for Courts-Martial under article 36 and that the courts cannot usurp the powers delegated to the President by adjudicating rules that are at odds with those established by the President. For this reason, in *United States v. Mathews*, 16 M.J. 354 (C.M.A. 1983), the court held that although the existing Rule for Courts-Martial governing the sentencing phase of capital trials was unconstitutional, it could not enact a new one in its place. In this case, the Court of Military Appeals, while not finding the review scheme of R.C.M. 305 unconstitutional, ruled that persons not authorized by the President to conduct probable cause reviews or to release pretrial prisoners from confinement could in fact conduct the judicial review under *Gerstein*. This interference with the Presidential scheme oversteps the bounds of the court's authority and violates the separation of powers. With this decision, the Court of Military Appeals has taken a path as misguided as that taken by the Ninth Circuit in *McLaughlin*.[12]

The power to establish the rules governing pretrial confinement review procedures belongs to the President alone. In reaching its decision in this case, the court usurped that power and essentially legislated a new type of review by a person not specifically authorized to conduct any of the re-

[11] Amendments to Article 36 were passed as a part of the Defense Authorization Act, Pub. L. No. 96-107, 96th Cong., 1st Sess. (Nov. 1979).

[12] In *McLaughlin*, the Ninth Circuit overruled legislative intent and the intent of *Gerstein* when it divided up the County of Riverside's combined pretrial confinement reviews. 111 S.Ct. at 1668-69.

views contemplated by the President. In doing so, the court below ignores the clear guidance of *Gerstein* that "[t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States." *Gerstein*, 420 U.S. at 123. The Court of Military Appeals decision struck down the purpose of R.C.M. 305(i). The Court of Military Appeals has no power to make law or to enforce it, and the court is not empowered to change the *Gerstein* review from R.C.M. 305(i) to R.C.M. 305(d) or any other new procedural invention. The decision of the Court of Military Appeals violates the doctrine of separation of powers.

CONCLUSION

The petition for certiorari should be granted. *Gerstein* and *McLaughlin* require a prompt judicial determination of probable cause by a neutral and detached magistrate to continue pretrial confinement following a warrantless arrest. The Court of Military Appeals has so far eroded the procedures established by the President to ensure the Fourth Amendment protections of *Gerstein* as to make them meaningless. The resulting procedures do not meet the constitutional requirements of the Fourth Amendment and constitute an impermissible interference with the President's power to establish a reasonable system of review under *Gerstein* and *McLaughlin*. The questions presented by this case are substantial and have no other means of redress besides this Court.

Respectfully submitted,

STEPHEN D. SMITH
Colonel, Judge Advocate General's Corps (JA)
United States Army
Chief, Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(703) 756-0583
Counsel of Record

and

JAMES H. WEISE
Lieutenant Colonel, JA, United States Army

FRAN W. WALTERHOUSE
Major, JA, United States Army

ROY H. HEWITT
Captain, JA, United States Army

DAVID L. THOMAS
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ALISON L. BECKER
Captain, JA, United States Army

December 1993

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-5007
CMR No. 9102033

UNITED STATES, APPELLANT

v.

WESLEY M. REXROAT, PRIVATE FIRST CLASS
U.S. ARMY, APPELLEE

Argued July 12, 1993
Decided Sept. 29, 1993

Counsel

For the United States: *Major Joseph C. Swetnam* (argued); *Colonel Dayton M. Cramer* and *Lieutenant Colonel Joseph A. Russelburg* (on brief).

For the Accused: *Captain David L. Thomas* (argued); *Colonel Malcolm H. Squires, Jr., Lieutenant Colonel James H. Weise, Major Fran W. Walterhouse* (on brief).

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer and enlisted members convicted Private First Class Rexroat, in accordance with his pleas, of 2 specifications of absence without leave; attempted larceny from a Navy Exchange, and 41 specifications of uttering worthless checks in violation of Articles 86,

80, and 123a, Uniform Code of Military Justice, 10 USC §§ 886, 880, and 923a, respectively. The approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to Private E1.

At trial, PFC Rexroat, appellee in this case, requested credit for 5 days of illegal pretrial confinement, arguing that a magistrate did not conduct a probable-cause review of his pretrial confinement within 48 hours as required by *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). The military judge denied the request. The Court of Military Review granted PFC Rexroat 5 days of credit for illegal pretrial confinement. 36 MJ 708, 715 (1992) (en banc).

The Judge Advocate General certified the following questions for our review:

I

DID THE ARMY COURT OF MILITARY REVIEW CORRECTLY CONCLUDE THAT THE PROVISIONS OF RCM 305(c) AND (d) OF THE 1984 MANUAL CANNOT MEET THE REQUIREMENTS OF *GERSTEIN [v. PUGH*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)] AND *[COUNTY OF] RIVERSIDE [v. MCLAUGHLIN*, 500 U.S. ___, 111 S.CT. 1661, 114 L.Ed.2d 49 (1991)]?

II

DID THE ARMY COURT OF MILITARY REVIEW CORRECTLY HOLD THAT THE REVIEW BY LTC [LIEUTENANT COLONEL] RANDALL COULD NOT MEET THE REQUIREMENTS OF *GERSTEIN* AND *RIVERSIDE*?

III

EVEN IF THIS COURT AGREES WITH THE ARMY COURT THAT RCM 305(i) IS THE ONLY

AUTHORIZED MEANS TO REVIEW A COMMANDER'S PRETRIAL CONFINEMENT ORDER, IS THE SEVEN DAY TIME LIMIT OF RCM 305(i) NONETHELESS REASONABLE IN THE MILITARY?

With respect to the first certified issue, we hold that the Court of Military Review was incorrect when they concluded that RCM 305(c) and (d), Manual for Courts-Martial, United States, 1984 (*see* Appendix), cannot meet the requirements of *Gerstein* and *McLaughlin*. We hold further that RCM 305(h) complies with *Gerstein* and *McLaughlin* when pretrial confinement is reviewed by a neutral and detached commander, if the review is accomplished within the time limits established by *McLaughlin*.

We answer the second certified issue in the negative. The record establishes that LTC Randall was neutral and detached. Although his review could not satisfy RCM 305(i) because he was not authorized by service regulations to conduct the RCM 305(i) review, his independent review of the probable-cause determination by the unit commander, Major Williams, was not prohibited by law or regulation; was conducted within the time limits established by *McLaughlin*; and was therefore sufficient to satisfy *Gerstein* and *McLaughlin*.

The third certified issue is resolved by our answer to the first certified issue. RCM 305(i) is not the only authorized means to review probable cause for pretrial confinement.

The pertinent facts are undisputed. PFC Rexroat was apprehended for shoplifting at the Pearl Harbor Navy Exchange on June 26, 1991. He was absent without leave at the time. He remained in custody until Major Williams ordered him into pretrial confinement on June 27 in accordance with RCM 305(d).

On June 28, LTC Randall, a unit commander not in PFC Rexroat's change of command, was briefed on the facts of the

case and determined that there was probable cause to keep PFC Rexroat in confinement. LTC Randall's authority to review PFC Rexroat's pretrial confinement was not contested at trial. LTC Randall had no knowledge of the case and was not otherwise involved in the prosecution of PFC Rexroat.

Major Williams reviewed PFC Rexroat's confinement in accordance with RCM 305(h) and memorialized his findings of probable cause and the need for continued confinement in a memorandum dated July 3, 1991. The timeliness of his RCM 305(h) review is not disputed. Also on July 3, Major Hudson, a judge advocate who had been appointed a military magistrate, conducted a hearing at which PFC Rexroat was represented by military counsel. Major Hudson determined that continued pretrial confinement was appropriate. On August 1, 1991, Major Steen, who apparently was Major Williams' successor in command, preferred charges against PFC Rexroat.

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Supreme Court held that the Fourth Amendment requires a person arrested without a warrant to be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention. This "prompt" judicial determination was to be made by a neutral and detached person independent of the police or prosecutor.

County of Riverside v. McLaughlin, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), went one step further to define what is "prompt" under *Gerstein*. The Court set out a bright-line rule that probable-cause determinations made after 48 hours of arrest are presumptively untimely. The Court stated:

> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of

> a bona fide emergency or other extraordinary circumstance.

500 U.S. at ___, 111 S.Ct. at 1670.

In *Courtney v. Williams*, 1 MJ 267 (CMA 1976), this Court, referring to *Gerstein*, held that "those procedures required by the Fourth Amendment in the civilian community must also be required in the military community," unless military necessity required a different rule. *Id.* at 270. The Court also held that, since bail does not exist in the military, "a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and if he should be detained." *Id.* at 271 (footnotes omitted).

Article 9(d), UCMJ, 10 USC § 809(d), provides: "No person may be ordered into arrest or confinement except for probable cause." In order to comport with the requirements of *Gerstein* and *Courtney*, the President promulgated RCM 305, which implements Article 9(d) and contains specific procedures for pretrial-confinement review. RCM 305(c) and (d) provide that a commissioned officer may order confinement only upon probable cause. RCM 305(h) requires a commander to determine within 72 hours whether pretrial confinement will continue. RCM 305(i) provides for review by "a neutral and detached officer" within 7 days of "the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement." Lastly, RCM 305(j) provides for review of "the propriety of pretrial confinement" by a military judge "[o]nce the charges . . . are referred to trial."

The *Gerstein* requirement for an initial probable-cause determination is addressed in Article 9(d) and RCM 305(d). The required prompt review of probable cause is addressed in RCM 305(h) and (i). The concern expressed in *Courtney v. Williams*, 1 MJ at 271, for a "bail hearing" substitute is

addressed in RCM 305(i). Lastly, RCM 305(j) provides the judicial review by a military judge which was lacking at the time *Courtney* was decided.

Transposing *Gerstein* and *McLaughlin* to military practice requires some discussion of terminology. *Gerstein* and *McLaughlin* both involved arrest by civilian police and pretrial detention in a jail house. PFC Rexroat was apprehended and held in custody until his commander could be notified and could determine whether to place him in pretrial confinement. Both "apprehension" and "custody" are terms of art in military law. *See* RCM 302(a)(1) ("Apprehension is the taking of a person into custody."). "Custody" may include physical restraint, albeit temporary. *See United States v. Ellsey*, 16 USCMA 455, 458-59, 37 CMR 75, 78-79 (1966). "All commissioned, warrant, petty, and noncommissioned officers" may take a person into custody pursuant to RCM 302(b)(2); but only a commissioned officer may order an enlisted person into pretrial restraint and only a commanding officer may order a civilian or officer into pretrial restraint. RCM 304(b). Pretrial confinement is a form of pretrial restraint. RCM 304(a)(4). Thus, when Major Williams ordered PFC Rexroat into pretrial confinement, he was actually continuing the physical restraint of PFC Rexroat in the Navy brig. However, upon execution of Major Williams' order, PFC Rexroat's condition legally changed from "custody" to "pretrial confinement."

The first question we must decide is whether the 48-hour time limit established in *McLaughlin* applies to the military services. The Army Judge Advocate General assumed that it did and issued guidance for implementing it. *See* 36 MJ at 712-13 n. 5. We agree that the 48-hour time limit imposed by *McLaughlin* applies to the military services.

The purpose of RCM 305 was to comply with *Gerstein* and *Courtney* and their progeny. *See* Drafters' Analysis of RCM 305, Manual, *supra* at A21-14.2 (Change 3). *McLaughlin*

refined *Gerstein* by defining the outer limits of a "prompt" review of pretrial detention. Applying the *Courtney* mandate, "[w]e discern no consideration of military necessity that would require a different rule." 1 MJ at 270.

It is important to note that *McLaughlin* merely sets up a presumption of untimely review when the 48-hour limit is exceeded. Therefore, if military exigencies prevent completion of probable-cause review within 48 hours, the fact of those exigencies may be used to rebut the presumption.

The next question is who is constitutionally qualified to conduct the review. PFC Rexroat contends that the probable-cause review must be conducted by a military magistrate. The Government contends that the review need only be made by a neutral and detached official, and that the commander's initial probable-cause determination under RCM 305(d) and the probable-cause review under RCM 305(h), both of which were accomplished within 48 hours in this case, were sufficient to satisfy *Gerstein* and *McLaughlin*.

In cases involving search authorizations, as opposed to imposition of pretrial confinement which is involved in this case, the question whether a commander may qualify as a neutral and detached magistrate has been the subject of many, often fragmented, opinions from this Court. In *United States v. Ezell*, 6 MJ 307 (CMA 1979), Judge Perry and Judge Cook held that a commander could act as a neutral and detached magistrate and issue a search authorization. In his principal opinion, Judge Perry wrote:

> We deline, however, to hold that military commanders are *per se* disqualified to act as neutral and detached magistrates. . . .
>
> In the case of *United States v. Ezell*, Number 31,304, we have determined that the commander acted as an impartial magistrate and that decision is, accordingly, affirmed."

6 MJ at 318, 310. Judge Cook wrote:

> An undeviating line of cases in this Court has acknowledged that a commanding officer is qualified to act as a neutral and detached magistrate to authorize a search in the military community.

6 MJ at 330. Chief Judge Fletcher had difficulty accepting a commander as a military counterpart to a civilian magistrate, but he recognized that a search authorized by a commander upon a showing of probable cause may be reasonable. 6 MJ at 330.

In *United States v. Stuckey,* 10 MJ 347 (CMA 1981), Chief Judge Everett, joined by Judge Fletcher, found a search authorization by a commander to be "reasonable." Chief Judge Everett, however, observed that, while we have "equated" a commander to a federal magistrate, a commander "cannot pass muster constitutionally as a 'magistrate' in the strict sense" and that "the commander is not a true 'magistrate.' " 10 MJ at 361.

More recently, in *United States v. Lopez,* 35 MJ 35 (CMA 1992), we decided that a commander who is neutral and detached is entitled to the same judicial deference on appellate review as a military judge when we review a search authorization for probable cause. Although there were four separate opinions in *Lopez,* a clear majority of this Court decided that the commander qualified as a neutral and detached magistrate in that case.

Our decisions involving review of pretrial confinement have dealt with review of the necessity for continued pretrial confinement, now covered by RCM 305(i) and (j), rather than the initial probable-cause determination now covered by RCM 305(d) and (h), although there is considerable dicta concerning the latter. In *Courtney v. Williams, supra,* this Court entertained a petition for extraordinary relief from a Navy

prisoner who had requested the military judge to review the propriety of his pretrial confinement. The military judge ruled that, under then-existing procedures, he had no authority to review pretrial confinement, and the petitioner asked for extraordinary relief. In a decision with three separate opinions, this Court denied relief. Chief Judge Fletcher, joined by Senior Judge Ferguson, held that no relief could be granted because the petitioner had been released from confinement. Chief Judge Fletcher examined *Gerstein v. Pugh, supra,* and the lack of bail procedures in the military and concluded that "a magistrate must decide if a person could be detained and if he should be detained." 1 MJ at 271. Although joining Chief Judge Fletcher, Senior Judge Ferguson noted that the military judge "certainly is not the only figure" with authority to review pretrial confinement. 1 MJ at 272 n. 2. Judge Cook concurred in the result, stating that a military judge had no authority to review pretrial confinement. 1 MJ at 272.

The *Gerstein* and *Courtney* opinions discuss both the initial probable-cause determination, *i.e.*, whether the person "could be detained," as well as the subsequent review of the necessity for continued pretrial detention, *i.e.*, whether the person "should be detained." Although the issue before our Court in *Courtney* dealt only with the question whether the military judge had authority to review the legality of the petitioner's pretrial confinement, Chief Judge Fletcher's dicta went beyond the issue in that he opined that a "magistrate" must determine whether the person "could be detained" as well as whether the person "should be detained." *Courtney* does not address who qualifies as a "magistrate"; the decision turns on the authority of a military judge to review pretrial confinement.

United States v. Malia, 6 MJ 65 (CMA 1978), considered the issue whether a commander could overrule the decision of a military magistrate releasing a soldier from pretrial confine-

ment. Chief Judge Fletcher, joined by Judge Perry, held that the commander could not overrule the military magistrate. Chief Judge Fletcher stated, "The cases which preceded *Courtney* directed necessary pretrial confinement hearings to be conducted by a judge. A magistrate by definition is a judge." 6 MJ at 66 (footnote omitted). Judge Cook dissented, repeating his assertion that the magistrate required by *Gerstein* need not be a judge. The three cases in the *Malia* footnote all involved lengthy pretrial confinement. 6 MJ at 66 n.1. In each case this Court, with Judge Cook dissenting, ordered the military judge to which the case was referred to convene a pretrial session to inquire into the legality of the pretrial confinement. *Milanes-Canamero v. Richardson*, 23 USCMA 710, 50 CMR 916 (1975); *Phillippy v. McLucas*, 23 USCMA 709, 50 CMR 915 (1975); *Porter v. Richardson*, 23 USCMA 704, 50 CMR 910 (1975). Although the *Malia* opinion contains broad language ("A magistrate by definition is a judge."), the holding extended only to the authority of a commander to overrule a military magistrate.

In *United States v. Lynch*, 13 MJ 394 (CMA 1982), the question was whether the staff judge advocate and the special court-martial convening authority were both disqualified from making the decision whether a person should remain in pretrial confinement. Judge Fletcher, joined by Chief Judge Everett, held that neither the staff judge advocate nor the convening authority qualified as a neutral and detached magistrate. In his lead opinion, Judge Fletcher stated that

> the following persons authorized by the Code to confine are constitutionally qualified as a judicial officer to make the pretrial confinement decision:
>
> First, a military judge constituted as such within the meaning of Article 26, UCMJ, 10 USC § 826.
>
> Second, a military magistrate empowered by service regulations and untainted by and unconnected with the court-martial referral process.

> Third, any other person authorized by the Code to confine who is not directly or particularly involved in the command's law enforcement function.

13 MJ at 397 (citation omitted). Judge Cook again dissented.

Although many of our prior decisions contain broad dicta arguably applying to the initial probable-cause determination, PFC Rexroat's case is the first case in which we must squarely decide who is constitutionally qualified to make and review the initial probable-cause determination.

Turning to the facts of this case, we hold that a commander is not *per se* disqualified to make the initial probable cause review required by *Gerstein*. The Supreme Court has held that a non-lawyer may be constitutionally qualified to determine whether there is probable cause to detain a person. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). We have held that a non-lawyer may be constitutionally qualified to determine whether there is probable cause to search. *United States v. Lopez*, 35 MJ at 40. We have held that a commander is not *per se* disqualified to determine whether there is probable cause to search. *United States v. Ezell*, 6 MJ 307 (CMA 1979); *United States v. Lopez, supra*. We perceive no reason to treat the determination of probable cause for pretrial confinement differently from probable cause to search. Accordingly, we hold that either of the commander's probable-cause determinations required by RCM 305(d) or (h) can satisfy *Gerstein* if the commander is neutral and detached, and can satisfy *McLaughlin* if conducted within 48 hours.

Major Williams' determination of probable cause for pretrial confinement was conducted within the *McLaughlin* time limits. Therefore, either of Major Williams' actions in accordance with RCM 305(d) and (h) could satisfy *Gerstein* and *McLaughlin* if Major Williams was neutral and detached. The charge sheet reflects that he was not the formal accuser in this case. The initial detention of PFC Rexroat was by security

personnel at Pearl Harbor and was not at Major Williams' direction. Thus Major Williams was not reviewing his own decision when he made his RCM 305(d) determination. Whether he was otherwise involved in the case against PFC Rexroat cannot be determined from the record. Accordingly, we are unable to determine if Major Williams was constitutionally qualified to perform the initial probable-cause determination required by *Gerstein* and RCM 305(d).

We turn next to the probable-cause review conducted by LTC Randall. The record reflects that LTC Randall had no prosecutorial or law enforcement role in this case. We are satisfied, as was the military judge and the court below, that he was neutral and detached; however, as the court below found, LTC Randall was not authorized by Army Regulations to perform the RCM 305(i) review. *See* 36 MJ at 714. Furthermore, since LTC Randall was not PFC Rexroat's commander, he was not authorized to perform the RCM 305(h) review. Nevertheless, the record shows no legal impediment to LTC Randall's conducting the probable-cause review required by *Gerstein*. While RCM 305 establishes specific procedures for reviewing pretrial confinement, it does not prohibit additional procedures not specifically required by RCM 305, such as LTC Randall's independent review. As a commissioned officer LTC Randall was empowered to order PFC Rexroat into confinement. Art. 9(b); RCM 304(b)(2). LTC Randall was not "directly or particularly involved in the command's law enforcement function." *United States v. Lynch*, 13 MJ at 397. Therefore, we hold that LTC Randall's independent review of the probable cause for pretrial confinement complied with *Gerstein*, *Courtney*, and *Lynch*, and was completed within the time limits imposed by *McLaughlin*.

The review by the military magistrate, Major Hudson, complied with RCM 305(i) and satisfied the *Courtney* requirement for a "bail" hearing. While Major Hudson was constitutionally

qualified to conduct the initial probable-cause review required by *Gerstein*, his review does not satisfy *McLaughlin* because it was not completed within 48 hours.

PFC Rexroat argues that the RCM 305(i) review is the only "authorized" probable-cause review and that, because it did not comply with *McLaughlin* in this case, he is entitled to relief. We disagree. RCM 305(d), (h), (i), and (j) all provide for a probable-cause review, any one of which, if conducted by a neutral and detached official within 48 hours, would satisfy *Gerstein* and *McLaughlin*.

PFC Rexroat also cites the Drafters' Analysis of RCM 305 for the proposition that RCM 305(c), (d), and (h) were not intended by the President to be the *Gerstein* review. We reject this argument for two reasons. First, the Drafters' Analysis is a reflection of the drafters' intent, not necessarily the President's. *See* Drafters' Analysis, Introduction, Manual, *supra* at A21-3 ("[I]t is important to remember that the Analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President."). Second, even if the President intended RCM 305(i) to be the *Gerstein* review, that intent does not preclude some other probable-cause review from satisfying *Gerstein*.

In summary, we hold that Major Williams complied with RCM 305(d) and (h). If he was neutral and detached, he also complied with *Gerstein* and *McLaughlin*, but we cannot tell from the record whether he qualified as a neutral and detached commander. Nevertheless, LTC Randall's independent review satisfied *Gerstein* and *McLaughlin*, even if Major William's compliance with RCM 305(d) and (h) did not. Major Hudson's review satisfied RCM 305(i). Therefore, since *Gerstein*, *McLaughlin*, and RCM 305 all were satisfied, PFC Rexroat is not entitled to relief.

The certified questions are answered in the negative.

The decision of the United States Army Court of Military Review is reversed to the extent that it grants PFC Rexroat 5 days of credit for illegal pretrial confinement. In all other respects the decision below is affirmed.

Judge CRAWFORD, concurs.

APPENDIX

Extract of RCM 305,
Manual for Courts-Martial, United States, 1984

Rule 305. Pretrial Confinement

* * *

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

* * *

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report

that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restrain are inadequate.

* * *

(i) *Procedures for review of pretrial confinement.*

(1) *In general.* A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

* * *

(j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propiety of pretrial confinement upon motion for appropriate relief.

* * *

(k) *Remedy.* The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

WISS, Judge (concurring):

I fully concur in the principal opinion. I recognize, as Judge Cox points out, that good commanders *care* about their units and the welfare of the men and women in them. In fact, it was this recognition that a commander is not so thoroughly disinterested as a third party would be that underlay my separate opinion in *United States v. Lopez*, 35 MJ 35, 49 (CMA 1992).

The perhaps-unstated, but certainly implied, distinction at the heart of my *Lopez* opinion, however, is between caring about the unit's welfare and the impact on it in a very general sense from criminal-justice matters, on the one hand, and caring in the more direct sense specifically about the criminal-justice matter then on his or her desk, on the other. *See id.* at 51. It is this same distinction, I believe, that is the foundation

of the decision in *United States v. Stuckey*, 10 MJ 347 (CMA 1981), in the context of whether a commander's search authorization based on probable cause was "reasonable." *See* 35 MJ at 51. It also is the same distinction at the foundation of the decision in *United States v. Ezell*, 6 MJ 307 (CMA 1979), which addressed circumstances under which a commander could be constitutionally seen as neutral and detached, again for purposes of issuing a search authorization.

The principal opinion here reflects the same concern about the RCM 305(d), Manual for Courts-Martial, United States, 1984, confinement decision by a commander that I expressed about that officer's probable-cause determination in my separate opinion in *Lopez*. So long as the commander who makes the probable-cause decision mandated by *Gerstein/McLaughlin*[1] is neutral and detached in the latter sense referred to earlier—that is, in the sense of the commander's interest and role as the commander in connection with the criminal offense allegedly committed by the accused—then the pretrial confinee's constitutional safe-guards are met in that regard. The remainder of the scheme of reviewing both the "could" and "should" confinement decisions in RCM 305, all together, fully assure that a military accused will not be held in pretrial confinement without due process.[2]

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[1] *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed. 49 (1991).

[2] Magistrate review of pretrial confinement is one of the factors pointed to by the majority in *United States v. Kossman*, ___ MJ ___ (CMA 1993), that reassured the majority there that there was no continued need for the speedy-trial standard of *United States v. Burton*, 21 USCMA 112, 44 CMR 166 (1971). More specifically, the *Kossman* majority trumpeted the scheme under which magistrates and judges, not just commanders, now have the keys to the jailhouse. If this building block in the rationale of the majority in that case is to have substance and not just appearance, there can be no dilution of the full panoply of those safeguards that are set out

COX, Judge (concurring in the result):

I agree that a commanding officer can determine if there is probable cause to place a member of his command in pretrial confinement. I further agree that this must be done "prompt[ly]," *i.e.*, within 48 hours. *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). However, unlike the majority, I would presume regularity; that is, the commander is always qualified to make the decision unless his personal interest in the case disqualifies him. The burden should be on the accused to challenge the commander's qualifications.

The term "neutral and detached commander" is an oxymoron. *See United States v. Lopez*, 35 MJ 35, 42 (CMA 1992) (Cox, J., concurring with modest reservations). Why not recognize that the military commander is statutorily and constitutionally charged with the responsibility for the morale and discipline of those within the command? Absent evidence to the contrary, we should give full faith and credit to his or her performance of those duties of command and quit trying to force a square peg into a round hole. *See United States v. Morris*, 28 MJ 8, 14 (CMA 1989) (Cox, J., concurring in part and dissenting in part).

SULLIVAN, Chief Judge (concurring in part and dissenting in part):

The commander who initially ordered pretrial confinement is not a neutral and detached magistrate for purposes of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54

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in RCM 305, and neither can there be any cutting corners when it comes to determining whether a commander who makes the *Gerstein/McLaughlin* decision truly is neutral and detached under the facts of the case; there simply cannot be any tendency toward a this-is-close-enough approach.

(1975), and *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). *See United States v. Malia*, 6 MJ 65, 66-67 (CMA 1978). This Court's decision in *United States v. Lynch*, 13 MJ 394 (CMA 1982), did not alter this precedent. To the extent that this Court undermines these decisions and affirms on this basis, I dissent. Otherwise I agree with the approach of the majority.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 9102033

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS WESLEY M. REXROAT, 334-68-9795,
UNITED STATES ARMY, APPELLANT

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8 Dec. 1992

For Appellant: Captain David L. Thomas, JAGC (argued), Major Fran W. Walterhouse, JAGC, Captain Michael P. Moran, JAGC (on brief).

For Appellee: Major Joseph C. Swetnam, JAGC (argued), Colonel Dayton M. Cramer, JAGC, Lieutenant Colonel Daniel J. Dell'Orto, JAGC, Lieutenant Colonel Joseph A. Russelburg, JAGC (on brief).

Before the Court Sitting EN BANC.

OPINION OF THE COURT ON RECONSIDERATION

CREAN, Senior Judge:

The appellant was found guilty, by a general court-martial composed of officer and enlisted members, of absence without leave (two specifications), attempted larceny from a Navy Exchange, and uttering worthless checks (41 specifications), in violation of Articles 86, 80, and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 880, and 923a (1982)

[hereinafter UCMJ]. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for thirty months, forfeiture of all pay and allowances, and reduction to Private E1.

The appellant was apprehended by security personnel of the U.S. Navy on 26 June 1991 and placed in the brig in Hawaii. The appellant's commander ordered him into pretrial confinement on 27 June 1991. Lieutenant Colonel (LTC) R, a unit commander not in the appellant's chain of command, conducted a probable-cause review of the commander's decision to order appellant into pretrial confinement on 28 June 1991, and determined that there was probable cause for the appellant's pretrial confinement. A second review of the appellant's pretrial confinement was performed on 3 July 1991, by a judge advocate military magistrate, pursuant to Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(i) [hereinafter R.C.M.] and Army Regulation 27-10, Legal Services: Military Justice, Chapter 9 (22 Dec. 1989) [hereinafter AR 27-10], who determined that continued pretrial confinement was warranted.

At trial, the appellant moved for appropriate relief, requesting five days' additional credit on the grounds that his pretrial confinement for the period from 28 June to 3 July was illegal. *See United States v. Gregory*, 21 M.J. 952 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (summary disposition). Specifically, he argued that LTC R's review of the commander's decision to confine him was constitutionally defective in two respects: (1) LTC R was not a neutral and detached magistrate as defined by AR 27-10 and as required by *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); and (2) the review was not conducted within forty-eight hours as required by *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). The military judge denied the motion after determining that LTC R did qualify as a

neutral and detached magistrate and that his review met the requisite constitutional standards.

Before this Court, the appellant has reasserted his constitutional challenge to the legitimacy of the five-day pretrial incarceration period, augmenting it with the additional argument that LTC R was inherently disqualified to act as a neutral and detached magistrate since, as a commander, he performed prosecutorial or law enforcement duties. A panel of this Court heard oral argument and issued an opinion on 22 September 1992, which was withdrawn upon request for reconsideration by the government. This Court, sitting *en banc*, heard oral argument on 19 November 1992. We hold that LTC R's review of the appellant's pretrial confinement was deficient because he was not authorized under R.C.M. 305(i) and AR 27-10 to act as a magistrate for the review of pretrial confinement.

The Supreme Court determined that when an individual is placed in pretrial confinement:

> [T]he detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty. Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

Gerstein, 420 U.S. at 114, 95 S.Ct. at 863.

The Court did not specify a particular procedure for accomplishing the probable cause review, but left that to each jurisdiction:

> [W]e recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we

> recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, . . . or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. . . . Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.

Gerstein, 420 U.S. at 123-25, 95 S.Ct. at 868-69 (footnotes and citations omitted).

The requirement that there be a prompt probable cause determination for pretrial confinement by a neutral and detached official is applicable to trials by court-martial. *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976).[1] In that case, the petitioner was placed in pretrial confinement by the commanding officer who exercised special court-martial convening authority over him. The Court of Military Appeals held that the decision to confine must be reviewed. The Court stated:

> The Code provides no procedure for reviewing the probable cause determination that is made by the person

[1] The question of whether *Gerstein* should apply to the military, because, technically, in a military setting there is no warrantless arrest that leads to pretrial confinement, was never fully litigated. In most military situations, the offending soldier is apprehended by the military police and returned to the control of his commander. The commander then determines the charges and the need for pretrial confinement. Accordingly, there is a probable cause determination for charges before confinement is authorized. However, since the requirement of *Gerstein* was held to apply to military criminal practice, and implementing procedures were subsequently established, the question of the applicability of *Gerstein* is now moot.

> ordering arrest or confinement. While it provides that probable cause is needed to order arrest or confinement and while it enumerates those persons authorized to arrest or confine, it does not go that next step that is mandated by the Constitution.

Id. at 270 (footnotes omitted).

The Court then mandated the Constitutional requirement:

> We believe that those procedures required by the Fourth Amendment in the civilian community must also be required in the military community. We discern no considerations of military necessity that would require a different rule.

Id.

Thus, the Court of Military Appeals, in the *Courtney* decision, mandated that a decision based on probable cause to place a soldier in pretrial confinement, whether that decision was made by a commander or a law enforcement official, must be reviewed by a neutral and detached magistrate.

The President, pursuant to his authority to prescribe court-martial procedure,[2] promulgated R.C.M. 305(i)[3] to provide the review of the decision to place a soldier in pretrial confinement. This provision sets forth a procedure to accomplish two tasks: a probable cause determination concerning whether the accused could be confined; and, a determination whether the accused should continue to remain confined. The review is to be performed within seven days, R.C.M. 305(i)(1), by an individual designated by the respective service Secretaries, R.C.M. 305(i)(2). While the Secretary of the Army could have provided that the review be conducted by a wide range of neutral and detached individuals, he designated, in AR 27-10,

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[2] UCMJ art. 36.

[3] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(i) analysis, app. 21, at A21-16.

that the authority, in the Army, to perform the probable cause review of a decision to place a soldier in pretrial confinement, rests only with a military judge or military magistrate.

The Supreme Court, in *County of Riverside v. McLaughlin*, subsequently defined the timing of a prompt review. In determining that a prompt, but not an immediate review, was required, the Court held:

> Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.

County of Riverside v. McLaughlin, 500 U.S. at ___, 111 S.Ct. at 1670, 114 L.Ed.2d at 62-63.[4]

Accordingly, we hold that the seven-day time requirement for the review of probable cause for pretrial confinement as required by R.C.M. 305(i)(1) will not pass constitutional muster since the review must now be performed within forty-eight hours.

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[4] Justices Marshall, Blackmun, and Stevens, in dissenting, would have affirmed the Ninth Circuit Court of Appeals opinion providing for a pretrial confinement review within thirty-six hours. *McLaughlin*, 500 U.S. at ___, 111 S.Ct. at 1671, 114 L.Ed.2d at 64. Justice Scalia, in his dissent, would have required a review within twenty-four hours. 500 U.S. ___, 111 S.Ct. at 1671, 114 L.Ed.2d at 65. Therefore, the forty-eight-hour rule is not as stringent as it may first appear.

The result of this precedent is that the decision to place a soldier in pretrial confinement must be reviewed by a neutral and detached magistrate within forty-eight hours. In the Army, the neutral and detached magistrate is a military judge or a judge advocate appointed as a military magistrate under Chapter 9, AR 27-10.

Realizing that the Supreme Court had established a new timeline for the probable cause review of pretrial confinement, the Office of The Army Judge Advocate General sent an electronic message to Army judge advocates informing them of the applicability of *McLaughlin* to the Army and advising them how to implement the decision.[5] This message clearly

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[5] Message 241900Z May 91

For SJA/JA/TDS/Mil Judge Legal Counsel
Subject: Prompt determination of Probable Cause for Pretrial Confinement

1. In *Riverside County, California v. McLaughlin*, 49 Crim.L.Rptr. (BNA) 2104 (U.S. May 13, 1991), the Supreme Court held that within 48 hours of a warrantless arrest there must be a neutral and detached determination of probable cause as required by *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). In those circumstances where the neutral review is not conducted within 48 hours, including weekends and holidays, the continued detention of the suspect will be presumptively unreasonable. The Court permits the probable cause review to be combined with other pretrial proceedings, but it must nevertheless be conducted within 48 hours of the warrantless arrest.

2. R.C.M. 305(h) provides for a neutral and detached review of pretrial confinement decisions within 7 days of the imposition of confinement. Because R.C.M. 305(h) was intended to provide the prompt review mandated by *Gerstein v. Pugh*, it is clear that the Court's 48 hour rule will impact upon military procedure.

3. Pending formal changes, SJA's should ensure that pretrial confinement determinations are subject to a neutral and detached probable cause review within 48 hours. The following are suggested as possible methods of providing this review.

A. A neutral and detached commander (not an accuser) should review the probable cause determination. If an immediate com-

indicates the Army Judge Advocate General's understanding that the Supreme Court had implemented a forty-eight hour requirement for the probable cause review for pretrial confinement which was binding on military criminal procedure. Based on the guidance in this message, LTC R was designated by his command to be the neutral and detached commander to perform the pretrial confinement probable cause review within forty-eight hours. Lieutenant Colonel R and his command followed The Judge Advocate General's guidance exactly and

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mander is an accuser, the next superior commander may be called upon to determine the basis for pretrial confinement, including a neutral review of probable cause. See Judge Everett's separate opinion in *United States v. Sharrock*, 32 M.J. 326, 332-33 (C.M.A. 1991).

B. In those jurisdictions requiring approval of pretrial confinement by the convening authority or a designee such as the Staff Judge Advocate, the official approving the commander's pretrial confinement decision may conduct a neutral review of the probable cause determination.

C. Where review at a confinement facility is not likely within 48 hours, part-time military magistrates may be asked to review the probable cause determination as part of the initial pretrial confinement processing at the installation.

4. The foregoing are not intended as substitutes for review procedures currently required by the Manual for Courts-Martial, Army Regulation 27-10, command regulations, or confinement facility procedures. They are offered only as suggestions to facilitate complying with the Supreme Court's 48 hour requirement.

5. Finally, a review required by R.C.M. 305(h) which is conducted within 48 hours of pretrial confinement will satisfy the burden imposed on the government. Staff Judge Advocates may wish to consider whether an adequate number of neutral reviewing officials are available to accommodate reviews within 48 hours.

We note that the message refers to R.C.M. 305(h). This section deals with the commander's justification within 72 hours of his decision to confine a soldier prior to trial. The reference to 305(h) is an error and the correct citation for the review mandated by *Gerstein* is R.C.M. 305(i).

did everything that they reasonably could to comply with the message's guidance.[6] However, we find that the guidance from the Office of The Judge Advocate General was flawed.

The Supreme Court did not require a totally new or different procedure for the review of pretrial confinement. The holding of *McLaughlin* merely decided the issue of what constituted a "prompt review" by delineating a forty-eight hour period. Therefore, its only effect on military procedure was to replace the seven-day rule of R.C.M. 305(i) with a forty-eight hour rule. The message from the Office of The Judge Advocate General went further and purported to authorize an additional change that affected *who* could conduct the probable cause review. We believe The Judge Advocate General did not have the authority to do this.[7]

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[6] There is no evidence before this Court as to LTC R's authority and whether his determination was final. Neither the government nor the appellant could provide us with the limits of his authority. However, we will assume for purposes of this opinion that his decision was final similar to a decision by a military magistrate under Chapter 9, AR 27-10.

[7] We need not decide whether a commander could be appointed to conduct the review of pretrial confinement. The *Gerstein* requirement is for a detached judicial determination of probable cause for confinement by a neutral official. The reviewing official need not be a lawyer. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). If an individual is performing a prosecutorial function, he cannot be a neutral and detached magistrate. *Coolidge v. New Hampshire*, 493 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The Court of Military Appeals has permitted three categories of persons to conduct a pretrial confinement probable cause reivew: a military judge, a military magistrate, and a person authorized by the Code to confine who is not directly or particularly involved in the command's law enforcement function. *United States v. Lynch*, 13 M.J. 394 (C.M.A. 1982); *see also United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992) (Though the authorizing official must be neutral and detached, there is no constitutional requirement that the person have some minimal legal or educational qualifications, or even that the issuing authority be a lawyer). *But see United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979); *United States v. Stuckey*, 10

Under R.C.M. 305(i)(2), the President established that pretrial confinement reviews "shall be made by a neutral and detached officer in accordance with regulations prescribed by the Secretary concerned." R.C.M. 305(i)(2). In Chapter 9, AR 27-10, the Secretary of the Army provided that the individuals authorized to conduct a pretrial confinement probable cause review as required by R.C.M. 305(i) were judge advocates appointed as military magistrates. *See* AR 27-10, paras. 9-1(d) and (e). Lieutenant Colonel R may have been a neutral and detached magistrate to satisfy the Fourth Amendment constitutional requirement as outlined in *Gerstein* and *McLaughlin*, but he does not satisfy the due process procedural requirements of R.C.M. 305(i) and Chapter 9, AR 27-10. Accordingly, we hold that under the present regulatory and procedural rules, the only individuals who can perform a probable cause review of pretrial confinement and satisfy constitutional, procedural, and regulatory requirements are

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M.J. 347 (C.M.A. 1981). We also note that at least one author has advocated the appointment of only lawyers as military magistrates. Owens, *A Hard Look at the Military Magistrate pretrial confinement Hearing: Gerstein and Courtney revisited*, 88 Mil.L.Rev. 3 (1980).

military judges and military magistrates conducting reviews under R.C.M. 305(i) within forty-eight hours of confinement.[8]

Our brother, Senior Judge De Giulio, in dissenting, asserts that the appellant received a probable cause review of his confinement when the commander, pursuant to R.C.M. 304(c) and 305(d), decided to place the appellant in pretrial confinement. In addition, he asserts that LTC R's review was sufficient to meet the requirements of *McLaughlin* since he was *capable* of performing the review. However, it is the commander's decision to place the appellant in pretrial confinement that *Courtney v. Williams* mandates be reviewed. We agree that LTC R was *capable* of making the probable cause review, however, he was not *authorized* to perform the review under R.C.M. 305(i) and Chapter 9, AR 27-10. The view of our brother, Judge Johnston, was rejected by the Court of Military Appeals in *Courtney*. In that case, the Court held that the commander's decision to confine, while based on probable cause, must be reviewed by a neutral and detached judicial official. The *Courtney* decision is controlling on the need for a review of the commander's decision to confine, and *McLaughlin* merely moved that review to forty-eight hours.

The President, of course, has the authority to change the procedure and the Secretary of the Army can designate a different category of neutral and detached persons to conduct the review. However, we do not advocate such a change. The present system of using military magistrates designated under

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[8] The Constitutional requirement extends only to a prompt probable cause review of pretrial confinement. It does not reach the determination whether the accused should remain in pretrial confinement. However, since the President has promulgated a procedure that incorporates both the probable cause determination and "the remain in confinement" determination in the same review, the practical effect is the same. The review of both determinations must be accomplished according to court-martial procedure within 48 hours.

Chapter 9, AR 27-10, has worked well and protects the interests of both the accused soldier and the command.[9] The only change required is for the R.C.M. 305(i) review to be conducted within forty-eight hours rather than seven days. This may be an inconsequential change since many court-

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[9] The Supreme Court established a two-part test for determining whether the qualifications of individuals performing magisterial functions meet Fourth Amendment standards. Not only must they be neutral and detached, but they must also be capable of making the probable cause determination. That is, not only must they be independent but they must also possess sufficient legal training to render reasoned decisions based upon the information presented to them. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 564 (1971). One federal court has noted:

> The Supreme Court has recognized that search warrants "have long been issued by persons who are neither lawyers nor judges," and noted that probable cause involves a "nontechnical, common-sense judgment of laymen." Yet, at least one commentator cautions against permitting what may have been tolerated in earlier times "because of the unavailability of law-trained judicial personnel" to permanently establish the boundaries of the Fourth Amendment. The shortcomings of permitting nonlawyers to issue warrants include: (1) the increasing legal complexity of search and seizure law; (2) the danger of nonlawyers relying on law enforcement personnel for guidance; and (3) the Supreme Court's recent reliance on magistrate's "good faith" in issuing warrants.

United States v. Martinez-Zayas, 857 F.2d 122, 134 n. 8 (3d Cir. 1988) (citations omitted). *See also North v. Russell*, 419 U.S. 1085, 95 S.Ct. 673, 42 L.Ed.2d 677 (1976).

Historically, the military justice system has employed nonlawyer commissioned officers in magisterial or quasi-judicial roles to a greater extent than civilian practice. Since nonlawyers receive limited training in constitutional law and military justice, it is not inconceivable that challenges to their capability to render reasoned legal magisterial decisions, such as probable cause to place a soldier in pretrial confinement, may be made. The prospect of such assaults succeeding on appeal are considerably greater when the magistrate has either limited or no legal training.

martial jurisdictions already conduct a review of the pretrial confinement decision shortly after the soldier is placed in confinement. We see no reason why a judge advocate military magistrate cannot conduct such a review within forty-eight hours. It is neither uncommon nor unduly burdensome for soldiers to work irregular hours in the performance of official duties. We are confident that a judge advocate military magistrate can be made available to conduct a review within the forty-eight hour time limit.

The findings of guilty and the sentence are affirmed. The appellant is granted five days' credit towards his sentence to confinement. Since this Court was advised that the appellant was due for release from confinement on 4 December 1992, an Order of the Court was issued on 20 November 1992 granting him the five days' credit.

Chief Judge GRAY, Senior Judge JOHNSON, Judge ARKOW, Judge WERNER, Judge GRAVELLE, Judge WALCZAK, and Judge GONZALES concur.

Judge DELL'ORTO did not participate in the decision of the case.

DE GIULIO, Senior Judge, with whom Senior Judge NAUGHTON joins, dissenting in part:

I dissent from the holding that a probable cause review of appellant's confinement was not conducted within forty-eight hours, as required by *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), and *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and as applied to the military by *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). I specifically disagree with the conclusion that military judges and military magistrates are the only individuals capable of performing a valid probable cause review of pretrial confinement. I also disagree with the assumption that the procedure set forth in R.C.M. 305(i) is the sole

procedure available in the military for accomplishing a probable cause review of confinement. I agree that the findings of guilty and the sentence should be affirmed.

In *Gerstein v. Pugh*, the United States Supreme Court held that a person arrested without warrant and held for trial on an information is entitled to a prompt judicial determination of probable cause by a neutral and detached magistrate, under the Fourth Amendment to the Constitution. The person making this determination does not necessarily have to be an attorney, but must be independent from the police or prosecution. *Gerstein*, 420 U.S. at 118, 95 S.Ct. at 865. *McLaughlin* defined a prompt review as one conducted within forty-eight hours. *McLaughlin* 500 U.S. at ___, 111 S.Ct. at 1670, 114 L.Ed.2d at 63.

In *Courtney*, the United States Court of Military Appeals applied the requirements of *Gerstein* to the military.[1] 1 M.J. at 270. Chief Judge Fletcher further stated that since the military did not have a bail system, "a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and should be detained." *Courtney*, 1 M.J. at 271. Although the analysis of R.C.M. 305(i) indicates the rule was promulgated to comply

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[1] An argument can be made that the probable cause to apprehend requirement of the Fourth Amendment is an exception that does not apply to the military. Rule For Courts-Martial 305(m) provides exceptions when a hearing by a magistrate is not required. Those exceptions are for operational necessity and aboard ships at sea. If the requirement is truly constitutional, it should apply in those instances. *But see Courtney*, 1 M.J. at 270. In addition, part of the reason for the probable cause determination as set forth in *Gerstein*; i.e., pretrial confinement may imperil the suspect's job and interrupt his source of income, does not exist in the military service. *See* R.C.M. 305 analysis at A21-14.2. Additionally, the initial probable cause determination may be equivalent to a warrant, and thus *Gerstein* would not apply. Perhaps the Court of Military Appeals will reexamine the holding *Courtney*.

with *Gerstein*, that conclusion may be faulty. For the Army, at least, R.C.M. 305(i) arose from the pilot magistrate program, which was established to comply with the Bail Reform Act of 1966, 18 U.S.C. § 3152(2). The pilot magistrate program was in existence prior to *Courtney*. *See Courtney*, 1 M.J. at 271 n. 14.

Unlike the civilian system, in the military a soldier is not placed in pretrial confinement by police officials. Several probable cause determinations are made for pretrial confinement. Only a commanding officer, to whose authority an officer is subject, can order pretrial confinement of an officer. *See* R.C.M. 304(b)(1) and 305(c). Only an officer can order enlisted personnel into pretrial confinement. R.C.M. 304(b)20 and 305(c). Probable cause is required for pretrial confinement, and the officer ordering pretrial confinement must make that probable cause determination. *See* R.C.M. 304(c) and 305(d). If the officer ordering pretrial confinement is not the commanding officer of the prisoner, a report must be made to the commanding officer who must make another probable cause determination. *See* R.C.M. 305(h). A determination to continue pretrial confinement must be placed in a memorandum with supporting documentation and forwarded to another officer for what is essentially another probable cause determination under R.C.M. 305(i). It is this latter determination which my brothers require to satisfy *Gerstein*, and it is that with which I disagree.

The probable cause determination made by the officer who initially orders a soldier into confinement or any of the probable cause determinations discussed in the previous paragraph are sufficient to satisfy the *Gerstein* and *McLaughlin* requirements so long as the officer making the determination is neutral an detached. It has been held that a commanding officer of a soldier is neutral and detached. *See United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992); *see also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979).

In the case before us, as evidenced by the record and the stipulation of appellant and counsel at trial, appellant's absence without leave was terminated on 26 June 1991 by his apprehension by military police at the Navy exchange. Appellant was placed in pretrial confinement on 27 June 1991 by his commanding officer.[2] On 28 June 1991, LTC R conducted a "neutral and detached" review of appellant's confinement, and determined that probable cause existed to believe that the accused had committed offenses under the Uniform Code of Military Justice, and that continued pretrial confinement was justified. On 3 July 1991, appellant's commanding officer prepared the memorandum required by R.C.M. 305(h)(2)(C). On 3 July 1991, the military magistrate found probable cause to continue pretrial confinement, after a determination pursuant to R.C.M. 305(i) and AR 27-10.

I would hold that the probable cause determination made by appellant's commander the day following the appellant's apprehension was sufficient to satisfy the *Gerstein* and *McLaughlin* requirement. Further, a probable cause determination was also made by LTC R the next day. After reviewing the entire record, I find nothing that would disqualify LTC R from making the probable cause determination required by *Gerstein*. The determination was made within forty-eight hours of confinement, and *McLaughlin* was also satisfied.

The majority's opinion appears to rest on a doctrine of preemption, i.e., that R.C.M. 305(i) provides the exclusive means of compliance with the Fourth Amendment requirement for a judicial determination of probable cause. This interpretation ignores the fact that R.C.M. 305(i) is a *review* of prior probable cause determinations. I assume it could be termed as

[2] Under R.C.M. 305(d), a commander may not order pretrial confinement unless there is probable cause to order such confinement. Appellant has never contended that his commander did not make such a determination prior to confinement.

an "Army due process" requirement with noncompliance resulting in illegal confinement. Appellant in this case received his R.C.M. 305(i) review, and "Army due process" was satisfied.

In arriving at its holding in this case, the majority states that:

> While the Secretary of the Army could have provided that the review be conducted by a wide range of neutral and detached individuals, he designated, in Army Regulation 27-10, that the authority, in the Army, to perform the probable cause review of a decision to place a soldier in pretrial confinement rests *only* with a military judge or military magistrate.

At 712 [emphasis added]. I disagree with that interpretation. The relevant paragraphs of AR 27-10 provide:

> d. A military magistrate is a JA [judge advocate] empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements, and to issue search and seizure authorizations on probable cause.
>
> e. An assigned military magistrate is a JA appointed by TJAG [The Judge Advocate General] or TJAG's designee and assigned to USALSA [US Army Legal Service Agency], a military judge assigned to the U.S. Army Judiciary, or an individual mobilization augmentee ordered to annual training with duty as a military judge.

AR 27-10, paras. 9-1(d) and (e). These paragraphs merely define the powers of a military magistrate. I find nothing in these provisions which limits pretrial probable cause review to only military magistrates.[3] Absent such a restriction, a conven-

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[3] Indeed, as stated earlier in this dissent, any officer ordering pretrial confinement must make a probable cause determination pursuant to R.C.M. 305(d).

ing authority is authorized to appoint officers as he sees fit to fulfill military justice responsibilities. *See generally* Army Reg. 600-20, Personnel: General Army Command Policy, paras. 1-4 and 1-5 (30 Mar. 1988).

The majority's opinion further states that "Lieutenant Colonel R may have been a neutral and detached magistrate to satisfy the Fourth Amendment constitutional requirement as outlined in *Gerstein* and *McLaughlin*, but he does not satisfy the due process procedural requirements of R.C.M. 305(i) and Chapter 9, AR 27-10." At 714. If the Manual for Courts-Martial and Army regulations create due process requirements which exist independent of constitutional requirements, then there is no requirement that those separate due process requirements be met within the forty-eight hour limit set forth in *McLaughlin*. R.C.M. 305(i) establishes a requirement that pretrial confinement be reviewed by a military magistrate within seven days, as was done in appellant's case.[4]

I would hold that the appellant received both a prompt probable cause determination under *Gersteini* and *McLaughlin*, and a timely review of that determination under R.C.M. 305(i), and is entitled to no further sentence credit. Accordingly, I dissent.

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[4] I am concerned that this Court has entered the area of establishing policy by advocating no change in personnel appointed as magistrates and using the implied threat of possible reversal on appellate review if nonlawyers are appointed to perform this function. I mention this only to emphasize that the UCMJ permits nonlawyers to perform numerous judicial functions. Indeed, it has been said that the convening authority, rarely a lawyer, is the most powerful judicial officer is the military justice system. In any event, this Court should stick to its business under Article 66, UCMJ, rather than resort to this type of obiter dictum.

JOHNSTON, Judge, with whom Judge BAKER joins, dissenting in part:

I concur with Senior Judge De Giulio's dissent, but desire to make additional comments. We need not reach the issue seized upon by the majority—the lack of authority for LTC R to review within 48 hours the probable cause prong of the confinement decision. We should focus instead upon the constitutional issue—did the probable cause determination, made by the appellant's commanding officer before confinement was imposed, meet the prompt review requirement of *Gerstein* and *McLaughlin*?

In this case the appellant, a soldier who had been dropped from the rolls of his unit as a deserter, was detained at 1700 hours on 26 June 1991 by a Pear Harbor Navy Exchange employee based on a reasonable belief that the accused had stolen a small television, CD player, and a VHS recorder from the Exchange. He was turned over to military police who began to investigate his offenses. Under questioning, the appellant admitted that he wanted to quit the Army, and that he absented himself from his unit when they "would not let him out."

On 27 June 1991, his company commander, a neutral and detached officer, reviewed all the circumstances of the case, determined that probable cause existed to further detain the appellant (i.e., that he could be detained), and ordered that he be confined in the local military confinement facility (i.e., that he should be detained). The confinement decision was reviewed within 48 hours by LTC R, a special court-martial convening authority not in the chain of command. The decision was further reviewed within seven days by the military magistrate. Both properly found that probable cause existed to confine and that further confinement was necessary.

This case is before the Court sitting *en banc* because of a conflict with a prior decision by another panel of this Court.

Judge Naughton and I examined this same issue in *United States v. Booth*, ACMR 9102787 (A.C.M.R. 27 Jul. 1992) (unpub.). We carefully considered the same assignment of error, the same legal briefs, the same arguments, and the same citations to authority. We concluded the assigned error was totally lacking in merit and was unworthy of a written opinion, as the appellant was attempting to equate entirely different concepts under the Fourth and Fifth Amendments.

How is it, then, that the Court sitting *en banc* has viewed the issue differently? I fear it is because our brothers have compared apples and oranges, as it were, and exalted form over substance. There is a material difference between: (a) an initial prompt, fair, and reliable determination of probable cause by a judicial officer; and, (b) the subsequent judicial review of a commanding officer's prior probable cause determination.

I.

We agree with the majority that in *Gerstein v. Pugh* the Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty *following warrantless arrest*. We all agree that *Gerstein* allowed flexibility to the various jurisdictions in implementing the review requirement. Indeed, in the majority opinion, our brothers cite that portion of the language from the Supreme Court opinion that the procedures adopted by the various jurisdictions: "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 420 U.S. at 123-25, 95 S.Ct. at 868-69.

We all agree that the "prompt" review requirement of *Gerstein* generally will be met if a jurisdiction provided a

judicial determination of probable cause within 48 hours of a warrantless arrest. *McLaughlin*, 500 U.S. at ___, 111 S.Ct. at 1670, 114 L.Ed.2d at 63 (1992). We are also in agreement that *Gerstein* and *McLaughlin* apply to the military.

We are in disagreement as to how the constitutional concepts apply in this case where a neutral and detaching commanding officer, acting pursuant to his statutory authority under Article 9, UCMJ, made a correct determination of probable cause *prior* to ordering the accused into pretrial confinement.

A.

In order to resolve our different views of the appellant's issue, we must examine the differences and similarities between civilian and military cases. In civilian society, there is no question that an individual who is arrested without a warrant by the police must be taken before a judicial official "promptly," i.e., within 48 hours for a determination of probable cause. The military counterpart to this situation occurs when a soldier is ordered in arrest or confinement by an authorized person other than a neutral and detached commander.[1] *See* UCMJ arts. 7 and 9. I am satisfied that a soldier in these circumstances also must be the recipient of a prompt review of the decision to restrain.

The situation in the case at bar, however, is more akin to the preliminary hearing in civilian society where a judicial official determines that probable cause exists to continue the deten-

[1] Although the civilian detention is termed an "warrantless arrest" and the latter, depending upon the circumstances and the authority of those involved, may be termed "apprehension," "arrest," or "confinement," the constitutional requirement is the same: a prompt (generally within 48 hours) judicial review of probable cause pursuant to the constitutional standards enunciated in *Gerstein* and *McLaughlin* before continued detention is permissible.

tion of the person seized at the time of the warrantless arrest. In the civilian system, the suspected criminal is detained, turned over to the police investigators, and evidence is gathered. He then has an appearance before a magistrate where a determination of probable cause is made before continued detention is permissible.

Military case law indicates that a commanding officer can be neutral and detached for making determinations of probable cause. *See United States v. Lopez*, 35 M.J. 35 (C.M.A. 1992). There is no constitutional requirement that the person determining probable cause have some minimal legal or educational qualifications, or even that the issuing authority be a lawyer. *Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). The Court of Military Appeals has previously said that a commanding officer is not disqualified from being neutral and detached merely because he was aware of the accused's prior record of conduct. *United States v. Rushing*, 11 M.J. 95 (C.M.A. 1981).

In this case, a neutral and detached commanding officer made a probable cause determination before he authorized pretrial confinement. In our view, an additional review of the probable cause determination by the neutral and detached official, whether a magistrate in the civilian system or a commander in the military system, is not mandated by *Gerstein* or *McLaughlin*.

B.

Our brothers rely on *Courtney v. Williams* for the proposition that the neutral and detached commanding officer's decision that probable cause existed should have been further reviewed to pass constitutional muster. *Courtney*, however, concerned a due process challenge under the Fifth Amendment to a military justice system that made no provision at all for the judicial review of a pretrial confinement decision. The

appellant in that case, who was pending a court-martial for two unauthorized absences, attempted to challenge the legality of his pretrial confinement based upon a subsequent assault. At trial the military judge ruled that he had no authority to review the pretrial confinement decision.

In reviewing a petition for extraordinary relief filed in *Courtney,* Chief Judge Fletcher sought to establish a rule for the review of both prongs of the confinement decision. The problem as he saw it was that "The Code provides no procedure for reviewing *the probable cause determination* that is made by the person ordering arrest or confinement." *Courtney,* at 270 (emphasis added). It should be noted that there is a significant difference between *reviewing* the probable cause determination and *making an initial probable cause determination.*

My brother, Senior Judge Crean, interprets *Courtney* too broadly in applying it to the case at bar. *Courtney* should be interpreted for what it intended—a military due process review of both prongs of the confinement decision. Neither the Fourth Amendment nor the decisions in *Gerstein* and *McLaughlin*, however, mandate a further review of a neutral and detached commanding officer's probable cause determination made prior to ordering a soldier into pretrial confinement.

II.

The majority opinion purports to establish a new rule for the Army based upon the 48-hour standard in *McLaughlin.* They go too far. The proper impact of *McLaughlin* on our practice is to change the 72-hour standard in R.C.M. 305(h)(2) to one of 48 hours and to specify that the confining commander or the reviewing commander be neutral and detached.

APPENDIX C

Rule 305. Pretrial confinement

(a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Discussion

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States. Article 12. However, if members of the armed forces of the United States are separated from prisoners of the other categories mentioned, they may be confined in the same confinement facilities.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confirmed if the requirements of this rule are met.

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

(c) *Who may order confinement. See* R.C.M. 304(b).

Discussion

"No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner." Article 11(a).

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

Discussion

The person who directs confinement should consider the matters discussed under subsection (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person's background and character or even the details of an offense before physically detaining the person. For example, until additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

"[W]hen charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be placed in confinement." Article 10.

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may be, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (*see* R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(B) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

(e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed.

(f) *Military counsel.* If requested by the prisoner, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) *Who may direct release from confinement.* Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant,

noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the prisoner should be notified. In unusual cases any commander to whose authority the prisoner is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with subsection (h)(2) of this rule.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner commited it; and

(iii) Confinement is necessary because it is foreseeable that:

(*a*) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(*b*) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

Discussion

A person should not be confined as a mere matter of convenience or expedience.

Some of the factors which should be considered under this subsection are:

(1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

(2) The weight of the evidence against the accused;

(3) The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

(4) The accused's character and mental condition;

(5) The accused's service record, including any record of previous misconduct;

(6) The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and

(7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records, police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the prisoner could be safely returned to the prisoner's unit, at liberty or under restriction, arrest, or conditions on liberty. *See* R.C.M. 304.

(C) *Memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the reviewing officer under subsection (i) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared. However, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *In general.* A review of the adequacy of probable

cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

(3) *Nature of review.*

(A) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner, and the prisoner's counsel, if any, shall be allowed to appear before the reviewing officer and make a statement, if practicable. A representative of command may appear before the reviewing officer to make a statement.

(B) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(C) *Standard of proof.* The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(4) *Extension of time limit.* The reviewing officer may, for good cause, extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

(5) *Action by reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(6) *Memorandum.* The reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the reviewing officer

shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(7) *Reconsideration of approval of continued confinement.* The reviewing officer shall, after notice to the parties, reconsider the decision to confine the prisoner upon request based upon any significant information not previously considered.

(j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(2) or (3) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit.* The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or of failure to comply with the provisions of subsection (f), (h), or (i) of this rule.

(k) *Remedy.* The remedy for noncompliance with subsection

(f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(l) *Confinement after release.* No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

See R.C.M. 304(b) concerning who may order confinement.

(m) *Exceptions.*

(1) *Operational necessity.* The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracti-

cable.

(2) *At sea.* Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The prisoner's commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

APPENDIX D

Chapter 9
Military Magistrate Program

Section I
General

9—1. Scope

a. This chapter establishes the Army-wide Military Magistrate Program. It authorizes and specifies procedures for the appointment and assignment of military magistrates and for their use to review pretrial confinement (R.C.M. 305(c)). It implements the Military Rules of Evidence (MRE), Rules 315 and 316, Part III, MCM and R.C.M. 302(e)(2), by authorizing military judges and magistrates to issue necessary search and seizure authorizations on probable cause.

b. There is no relationship between the Military Magistrate Program and DA's implementation of the Federal Magistrate System to dispose judicially of uniform violation notices and minor offenses committed on military installations (AR 190-29).

c. The Military Magistrate Program is an Army-wide program for review of pretrial confinement and the issuance of search and seizure authorizations, on probable cause, by neutral and detached magistrates.

d. A military magistrate is a JA [Judge Advocate] empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements, and to issue search and seizure authorizations on probable cause.

e. An assigned military magistrate is a JA appointed by TJAG [The Judge Advocate General] or TJAG's designee and assigned to USALSA [United States, Army Legal Services Agency], a military judge assigned to the U.S. Army Trial Judiciary, or an individual mobilization augmentee ordered to annual training with duty as a military judge.

f. A part-time military magistrate is a JA not assigned to USALSA, appointed by TJAG or TJAG's designee, who is authorized to perform the duties of a magistrate.

g. The supervising military judge is a military judge assigned to the U.S. Army Trial Judiciary designated to supervise the activities of military magistrates within the supervising military judge's jurisdiction.

9-2. Appointment of military magistrates

a. Assigned military magistrates. Assigned military magistrates will be appointed by TJAG or TJAG's designee upon recommendation by the Chief Trial Judge, U.S. Army Judiciary.

b. Part-time military magistrates. Part-time military magistrates will be appointed by TJAG or, if the authority to appoint such magistrates is delegated by TJAG, by the Commander, USALSA, the Chief Trial Judge, chief circuit judges, and supervising military judges, as follows:

(1) Staff judge advocates may nominate one or more JAs for appointment as part-time military magistrates.

(2) Nominees will not be engaged in criminal investigation or the prosecuting function and will possess the requisite training, experience, and maturity to perform the duties of a magistrate.

(3) Nominations will be forwarded to the appropriate designee of TJAG. The designee shall forward the names of appointed part-time military magistrates to the Chief Trial Judge, (JALS-TJ), Nassif Building, Falls Church, VA 22041-5013.

9-3. Powers of military magistrates

a. Review of confinement.

(1) Assigned military magistrates will be given responsibility for reviewing pretrial confinement in any confinement facility as TJAG or TJAG's designees shall direct.

(2) Part-time military magistrates will be given responsibility for reviewing pretrial confinement as determined by the supervising military judge.

b. Issuance of search, seizure, and apprehension authorizations. Any military magistrate, whether assigned or part-time, is authorized to issue search and seizure and search and apprehension authorizations on probable cause under section III.

c. Review of confinement pending outcome of foreign criminal charges. Military magistrates, whether assigned or part-time, are authorized to review confinement of soldiers, in U.S. facilities, pending final disposition, including appeals, of foreign criminal charges (see chap 17). (Final disposition of foreign criminal charges incorporates all stages of the host country's criminal proceedings, including appeals, up to commencement of any sentence to confinement resulting from conviction on the foreign criminal charges.)

9-4. Supervision of military magistrates

a. The Chief Trial Judge, US Army Trial Judiciary. The Chief Trial Judge, US Army Trial Judiciary, under the supervision of the Commander, USALSA, is responsible for the general administration of the Military Magistrate Program. These responsibilities include—

(1) Making recommendations to TJAG on the appointment of military magistrates and other aspects of the program.

(2) Establishing programs for training.

(3) Recommending duty stations at which assigned military magistrates will be located.

(4) Assignment of responsibility for servicing particular confinement facilities.

(5) Designating supervising military judges.

(6) Monitoring rating schemes for military magistrates.

(7) Designating raters and senior raters of OERs for assigned military magistrates.

b. Supervising military judge. The supervising military judge will be responsible for the direct supervision of military magistrates, assigned or part-time, in the performance of magisterial duties.

Section II
Pretrial Confinement

9-5. Review by military magistrate

a. General.

(1) All military magistrates, whether assigned or part-time, are empowered to order the release from pretrial confinement of any confinee in any US Army confinement facility on determination (following review of the case) that continued pretrial confinement does not satisfy legal requirements. The military magistrate will consider all relevant facts and circumstances surrounding each case of pretrial confinement in arriving at this decision. Military magistrates will review each case of pretrial confinement according to the procedures and criteria contained in R.C.M. 305(c) and this paragraph.

(2) Part-time military magistrates will be appointed to review pretrial confinement in all cases at confinement facilities not normally served by assigned military magistrates. Whoever initially authorizes pretrial confinement in a facility not administered by the Army will immediately notify the officer exercising GCM jurisdiction over the person confined. This officer will forthwith cause the responsible military magistrate to be notified of the case.

(3) The procedures set forth in paragraph 9-5*b* of this regulation are not applicable to the review of cases of Army service members confined in Navy, Marine Corps, Air Force, or Coast Guard confinement facilities. The review of pretrial confinement of a service member of the US Army shall be governed by the military magistrate regulations of the Armed Force that has jurisdiction over the place of confinement.

Army service members ordered into pretrial confinement shall be confined in Army confinement facilities whenever practicable.

(4) Service members of other Armed Forces ordered into pretrial confinement in Army confinement facilities shall be subject to the provisions of this section, unless specific exceptions to these provisions, consistent with R.C.M. 305 are requested in writing by an officer of the other Armed Force.

b. Procedures.

(1) The military magistrate will review pretrial confinement under R.C.M. 305(i). His or her decision to approve or disapprove pretrial confinement is not subject to appeal (*but see* R.C.M. 305(i) (2) pertaining to reconsideration of a decision to approve confinement).

(2) The commander of the person confined, on ordering confinement or receiving notification of confinement, will provide the military magistrate with a completed DA Form 5112-R (Checklist for Pretrial Confinement). The commander will include on or append to the DA Form 5112-R a statement of the basis for the decision to confine (*see* R.C.M. 305(h)(2)(C)). (*A reproduction master copy of this form appears at the end of this regulation and will be locally reproduced on 8½- by 11-inch paper.*)

(3) Military magistrates may not impose conditions on release from confinement, but may recommend appropriate conditions to the unit commander.

(4) The unit commander concerned may impose any authorized pretrial restraint deemed necessary on a person released from confinement by a magistrate. However, the unit commander may not order the return of that person to pretrial confinement except when an additional offense is committed or on receipt of newly discovered information (*see* R.C.M. 305(*l*). The military magistrate will be immediately notified of any reconfinement and the reasons therefor.

(5) Circumstances of persons who, after release by a military magistrate, are reconfined will be reviewed by the military magistrate. The determination of whether continued pretrial confinement is warranted will be made on the same legal basis as the review and determination for initial pretrial confinement.

(6) The military magistrate will communicate the decision in each case to the person confined. This may be accomplished by means of a copy of the written record of decision. In addition, a record of the magistrate's decision(s) will be filed in that person's correctional treatment file (see AR 190-47).

9-6. Administrative and logistical support

The provisions of paragraph 8-7 pertaining to members of the US Army Judiciary are also applicable to assigned military magistrates.

Section III
Search, Seizure, and Apprehension Authorizations

9-7. Authority of military judges and magistrates to issue authorizations

The following are authorized to issue search and seizure and search and apprehension authorizations on probable cause (MRE 315(d)(2)) with respect to persons and property specified in MRE 315(c):

a. Military judges assigned or attached to the US Army Trial Judiciary.

b. Military magistrates assigned to USALSA.

c. Part-time military magistrates appointed under paragraph 9-2*b*.

9-8. Issuance

a. The procedures for the issuance of search and seizure and search and apprehension authorizations are contained in

the MRE. Authorizations to search and seize or search and apprehend may be issued on the basis of a written or oral statement, electronic message, or other appropriate means of communication. Information provided in support of the request for authorization may be sworn or unsworn. The fact that sworn information is generally more credible and often entitled to greater weight than information not given under oath should be considered.

b. DA Form 3744-R (Affidavit Supporting Request for Authorization to Search and Seize or Apprehend) may be used if the supporting information is to be sworn. A sample completed affidavit is shown at figure 9-1. Authorizations to search and seize or search and apprehend may be issued orally or in writing. DA Form 3745-R (Search and Seizure Authorization) or DA Form 3745-1-R (Apprehension Authorization) may be used if an authorization is issued in writing. (*DA Forms 3744-R, 3745-R, and 3745-1-R will be reproduced locally on 8½ by 11-inch paper. Copies of these forms are located at the back of this regulation.*)

9-9. Oaths

See chapter 11 for the authority, procedures, and forms for administering oaths to persons providing information to commanders and other military personnel empowered to issue authorizations to search and seize.

9-10. Execution and disposition of authorizations and other related papers

a. Execution. MRE 315(h) governs the execution of authorizations to search and seize. In addition to those requirements, the authorization should be executed within 10 days after the date of issue. An inventory of the property seized will be made at the time of the seizure or as soon as practicable. A copy of the inventory will be delivered to the person from

whose possession or premises the property was taken. DA Form 4137 (Evidence/Property Custody Document) may be used.

b. Disposition of authorization and other papers. After the authorization has been executed, the authorization and a copy of the inventory will be returned to the issuing authority. Thereafter, all documents and papers relative to the search or seizure will be transmitted to the appropriate law enforcement office. It will be filed for use in any future litigation or proceeding on the results of such a search.

9-11. Recovery and disposition of property

a. Evidence retained for courts-martial. Evidence retained for courts-martial will be disposed of according to applicable regulations. SJAs will make every effort to return property, when appropriate, as expediently as possible by substituting photographic or written descriptions when such measures will not jeopardize pending prosecutions.

b. Property seized by US Army Criminal Investigation Command (USACIDC). The provisions of AR 195-5 govern the recovery and disposition of property seized pursuant to an authorization to search and seize conducted by US Army criminal investigators.

c. Property seized by other authorized persons. The provisions of AR 190-22, chapter 3, govern the recovery and disposition of proeprty seized pursuant to a search or seizure by other authorized persons.

9-12. Reapplication

Any person requesting authorization to search and seize must disclose to the issuing authority any knowledge that person has of denial of any previous request for a search and seizure authorization involving the same individual and the same property.

9-13. Legality of searches and seizures

The requirements set forth in this chapter are administrative only and the failure to comply does not, in and of itself, render the search or seizure "unlawful" within the meaning of MRE 311.

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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PRIVATE FIRST CLASS,
United States Army, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF THE UNITED STATES AIR FORCE APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DEL GRISSOM
Captain, United States Air Force
Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562
Counsel of Record

JAY LINDSEY COHEN
Lieutenant Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Amicus Curiae

December 1993

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INTEREST OF THE *AMICUS CURIAE*

The United States Air Force Appellate Defense Division represents Air Force members during appeal of their court-martial convictions. We currently represent a number of members who share Petitioner's issue. Their ability to petition for a writ of certiorari will likely be foreclosed if this petition for a writ of certiorari is not granted.[1] We are vitally interested in providing the Supreme Court with information and our specialized insight to this area of military law in support of this Court granting certiorari as requested by Petitioner's brief.

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[1] 10 U.S.C.A. § 867a (West Supp. 1992); 28 U.S.C.A. § 1259 (West Supp. 1992).

ARGUMENT

MILITARY COMMANDERS ARE NOT NEUTRAL AND DETACHED MAGISTRATES UNDER THE FOURTH AMENDMENT FOR PURPOSES OF A *GERSTEIN* JUDICIAL REVIEW.

By its decision in *United States v. Rexroat*, 38 M.J. 292, (CMA 1993) (Appendix A), the United States Court of Military Appeals sought to continue the traditionally high involvement level of military commanders in both the affairs of command and the personal lives of those under their command. The historical relationship between a military commander and his subordinates has created a need for limited intrusions by a commander into the daily private lives and individual rights of his personnel. Military commanders, by nature of their position, are not neutral and detached from the law enforcement and prosecution functions on the installation. In *Rexroat*, the Court of Military Appeals judicially sanctioned allowing military commanders to review pretrial confinement probable cause determinations despite their role in enforcing the laws of command. While we agree that, in some matters essential to the proper functioning of the military and the fulfillment of its mission, commanders are properly allowed some leeway or limited level of involvement, in matters of Fourth Amendment law, the level of involvement must be proscribed in recognition of the necessity of a "neutral and detached" judicial review and probable cause determination as to confinement.

Military law and precedent after *Gerstein v. Pugh*, 420 U.S. 103 (1975) show the Court of Military Appeals' attempts to navigate between the Scylla and the Charybdis aspects of command responsibility and individual rights. In our service, like the other branches of the armed services, commanders have been accorded quasi-judicial status only with reluctance

and reservation. *See United States v. Ezell,* 6 M.J. 307 (CMA 1979) and *United States v. Malia,* 6 M.J. 65 (CMA 1978).

In *Courtney v. Williams,* 1 M.J. 267 (CMA 1976) the Court of Military Appeals noted that *Gerstein* would dictate that "procedures required by the Fourth Amendment in the civilian community must also be required in the military community, unless military necessity compelled a different rule. *Courtney* at 270.[2] The Court of Military Appeals in *Rexroat* did not analyze why the military needed a different rule, opting instead to assess the persons involved and their level of neutrality and detachment. Interestingly, the commander's level of involvement in the *Rexroat* case was not even able to be determined from the record. Thus, the court was "unable to determine if Major Williams was constitutionally qualified to perform the initial probable-cause determination required by *Gerstein* and RCM 305(d)." *Rexroat* at 16.

Thus, even though the *Rexroat* court refused to state a *per se* rule against commanders acting as magistrates in all cases, they did recognize the serious potential of prejudice by refusing to find Major Williams constitutionally qualified to perform the initial review. Despite this, the Court of Military Appeals stopped short of the constitutionally required protection of military members' rights.

Many cases coming into this Division reflect involvement by the commanders prior to the probable cause determination itself. In absence without leave (AWOL)[3] or desertion[4] cases,

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[2] *Courtney* also indicates that "the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney* at 270, *citing Kauffman v. Secretary of the Air Force,* 135 U.S. App.D.C. 1, 415 F.2d 991 (1969).

[3] 10 U.S.C.A. § 886 (West Supp. 1992).

[4] 10 U.S.C.A. § 885 (West Supp. 1992).

which make up the majority of the pretrial confinement issues in our experience, the commanders are intimately involved in searching for the member and investigating and acting in concert with the police. They are almost always the formal accuser[5] of the charges filed against the member, and take adverse actions prior to or immediately upon apprehension to discipline or investigate other offenses which precipitated the absence in the first place.[6] They interact and cooperate frequently with the law enforcement officials, contrary to the mandate in *Gerstein,* 420 U.S. at 112, 118. Air Force practice allows the member's commander to make the initial determination of probable cause as well as to review his decision within 72 hours and only requires that a "military magistrate" make some sort of decision and report within 7 days. *See* Air Force Regulation 111-1 (C2), Chapter 4, paras. 4-1 and 4-2. 12 July 1989. (Appendix B). Unlike the Army, Air Force practice does not require that judge advocates perform the magistrate duties.

As noted in *Gerstein,* the procedure adopted to comply with the Fourth Amendment "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." 420 U.S. at 126 (1974) (footnotes omitted).

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[5] 10 U.S.C.A. § 801(9) (West Supp. 1992) defines an Accuser as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused."

[6] *Gerstein* noted that the protection of the Fourth Amendment is that it requires that the inferences which reasonable men draw from evidence be drawn by a neutral and detached magistrate rather than by those "engaged in ferreting out crime." 420 U.S. at 113, 114, *quoting Johnson v. United States,* 333 U.S. 10, 13-14, (1948)

Commanders are not judicial officers. They have interests in maintaining good order and discipline in their command and in the service in general which makes them too partial and involved to fulfill the requirements of a neutral and detached magistrate. *See United States v. Stuckey,* 10 M.J. 347, 361 (CMA 1981) and *United States v. Lopez,* 35 M.J. 35, 51-52 (CMA 1992) (Wiss, J. concurring in the result). The potential for abuse by commanders is too great. The potential for military members languishing in jail awaiting trial and resolution of these issues on appeal render the stakes for the imprisoned too important to allow this case-by-case approach to pretrial confinement problems to be acceptable any longer under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Military Appeals should be reversed allowing the military member to be assured of receiving a probable cause determination prior to and immediately after confinement by a neutral and detached individual, not a commander.

Respectfully submitted,

DEL GRISSOM
Captain, United States Air Force
Appellate Defense Division
Air Force Legal Services Agency
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562
Counsel of Record

JAY LINDSEY COHEN
Lieutenant Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Amicus Curiae

December 1993

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-5007
CMR No. 9102033

UNITED STATES, APPELLANT

v.

WESLEY M. REXROAT, PRIVATE FIRST CLASS
U.S. ARMY, APPELLEE

Argued July 12, 1993
Decided Sept. 29, 1993

Counsel

For the United States: *Major Joseph C. Swetnam* (argued); *Colonel Dayton M. Cramer* and *Lieutenant Colonel Joseph A. Russelburg* (on brief).

For the Accused: *Captain David L. Thomas* (argued); *Colonel Malcolm H. Squires, Jr., Lieutenant Colonel James H. Weise, Major Fran W. Walterhouse* (on brief).

Military Judge: MICHAEL B. KENNETT

Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer and enlisted members convicted Private First Class Rexroat, in accordance with his pleas, of 2 specifications of absence without leave; attempted larceny from a Navy Exchange; and 41 specifications of uttering worthless checks in violation of Articles 86,

80, and 123a, Uniform Code of Military Justice, 10 USC §§ 886, 880, and 923a, respectively. The approved sentence provides for a bad-conduct discharge, confinement for 30 months, total forfeitures, and reduction to Private E1.

At trial, PFC Rexroat, appellee in this case, requested credit for 5 days of illegal pretrial confinement, arguing that a magistrate did not conduct a probable-cause review of his pretrial confinement within 48 hours as required by *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). The military judge denied the request. The Court of Military Review granted PFC Rexroat 5 days of credit for illegal pretrial confinement. 36 MJ 708, 715 (1992) (en banc).

The Judge Advocate General certified the following questions for our review:

I

DID THE ARMY COURT OF MILITARY REVIEW CORRECTLY CONCLUDE THAT THE PROVISIONS OF RCM 305(c) AND (d) OF THE 1984 MANUAL CANNOT MEET THE REQUIREMENTS OF *GERSTEIN [v. PUGH*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975)] AND *[COUNTY OF] RIVERSIDE [v. MCLAUGHLIN*, 500 U.S. ___, 111 S.CT. 1661 (1991)]?

II

DID THE ARMY COURT OF MILITARY REVIEW CORRECTLY HOLD THAT THE REVIEW BY LTC [LIEUTENANT COLONEL] RANDALL COULD NOT MEET THE REQUIREMENTS OF *GERSTEIN* AND *RIVERSIDE*?

III

EVEN IF THIS COURT AGREES WITH THE ARMY COURT THAT RCM 305(i) IS THE ONLY

AUTHORIZED MEANS TO REVIEW A COMMANDER'S PRETRIAL CONFINEMENT ORDER, IS THE SEVEN DAY TIME LIMIT OF RCM 305(i) NONETHELESS REASONABLE IN THE MILITARY?

With respect to the first certified issue, we hold that the Court of Military Review was incorrect when they concluded that RCM 305(c) and (d), Manual for Courts-Martial, United States, 1984 (*see* Appendix), cannot meet the requirements of *Gerstein* and *McLaughlin*. We hold further that RCM 305(h) complies with *Gerstein* and *McLaughlin* when pretrial confinement is reviewed by a neutral and detached commander, if the review is accomplished within the time limits established by *McLaughlin*.

We answer the second certified issue in the negative. The record establishes that LTC Randall was neutral and detached. Although his review could not satisfy RCM 305(i) because he was not authorized by service regulations to conduct the RCM 305(i) review, his independent review of the probable-cause determination by the unit commander, Major Williams, was not prohibited by law or regulation; was conducted within the time limits established by *McLaughlin*; and was therefore sufficient to satisfy *Gerstein* and *McLaughlin*.

The third certified issue is resolved by our answer to the first certified issue. RCM 305(i) is not the only authorized means to review probable cause for pretrial confinement.

The pertinent facts are undisputed. PFC Rexroat was apprehended for shoplifting at the Pearl Harbor Navy Exchange on June 26, 1991. He was absent without leave at the time. He remained in custody until Major Williams ordered him into pretrial confinement on June 27 in accordance with RCM 305(d). On June 28, LTC Randall, a unit commander not in PFC Rexroat's chain of command, was briefed on the facts of

the case and determined that there was probable cause to keep PFC Rexroat in confinement. LTC Randall's authority to review PFC Rexroat's pretrial confinement was not contested at trial. LTC Randall had no knowledge of the case and was not otherwise involved in the prosecution of PFC Rexroat. Major Williams reviewed PFC Rexroat's confinement in accordance with RCM 305(h) and memorialized his findings of probable cause and the need for continued confinement in a memorandum dated July 3, 1991. The timeliness of his RCM 305(h) review is not disputed. Also on July 3, Major Hudson, a judge advocate who had been appointed a military magistrate, conducted a hearing at which PFC Rexroat was represented by military counsel. Major Hudson determined that continued pretrial confinement was appropriate. On August 1, 1991, Major Steen, who apparently was Major Williams' successor in command, preferred charges against PFC Rexroat.

In *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Supreme Court held that the Fourth Amendment requires a person arrested without a warrant to be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention. This "prompt" judicial determination was to be made by a neutral and detached person independent of the police or prosecutor.

County of Riverside v. McLaughlin, 500 U.S. ___, 111 S.Ct. 1661 (1991), went one step further to define what is "prompt" under *Gerstein*. The Court set out a bright-line rule that probable-cause determinations made after 48 hours of arrest are presumptively untimely. The Court stated:

> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of

a bona fide emergency or other extraordinary circumstance.

111 S.Ct. at 1670.

In *Courtney v. Williams*, 1 MJ 267 (CMA 1976), this Court, referring to *Gerstein*, held that "those procedures required by the Fourth Amendment in the civilian community must also be required in the military community," unless military necessity required a different rule. *Id.* at 270. The Court also held that, since bail does not exist in the military, "a neutral and detached magistrate must decide more than the probable cause question. A magistrate must decide if a person could be detained and if he should be detained." *Id.* at 271 (footnotes omitted).

Article 9(d), UCMJ, 10 USC § 809(d), provides: "No person may be ordered into arrest or confinement except for probable cause." In order to comport with the requirements of *Gerstein* and *Courtney*, the President promulgated RCM 305, which implements Article 9(d) and contains specific procedures for pretrial-confinement review. RCM 305(c) and (d) provide that a commissioned officer may order confinement only upon probable cause. RCM 305(h) requires a commander to determine within 72 hours whether pretrial confinement will continue. RCM 305(i) provides for review by "a neutral and detached officer" within 7 days of "the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement." Lastly, RCM 305(j) provides for review of "the propriety of pretrial confinement" by a military judge "[o]nce the charges . . . are referred to trial."

The *Gerstein* requirement for an initial probable-cause determination is addressed in Article 9(d) and RCM 305(d). The required prompt review of probable cause is addressed in RCM 305(h) and (i). The concern expressed in *Courtney v. Williams*, 1 MJ at 271, for a "bail hearing" substitute is

addressed in RCM 305(i). Lastly, RCM 305(j) provides the judicial review by a military judge which was lacking at the time *Courtney* was decided.

Transposing *Gerstein* and *McLaughlin* to military practice requires some discussion of terminology. *Gerstein* and *McLaughlin* both involved arrest by civilian police and pretrial detention in a jail house. PFC Rexroat was apprehended and held in custody until his commander could be notified and could determine whether to place him in pretrial confinement. Both "apprehension" and "custody" are terms of art in military law. *See* RCM 302(a)(1) ("Apprehension is the taking of a person into custody."). "Custody" may include physical restraint, albeit temporary. *See United States v. Ellsey,* 16 USCMA 455, 458-59, 37 CMR 75, 78-79 (1966). "All commissioned, warrant, petty, and noncommissioned officers" may take a person into custody pursuant to RCM 302(b)(2); but only a commissioned officer may order an enlisted person into pretrial restraint and only a commanding officer may order a civilian or officer into pretrial restraint. RCM 304(b). Pretrial confinement is a form of pretrial restraint. RCM 304(a)(4). Thus, when Major Williams ordered PFC Rexroat into pretrial confinement, he was actually continuing the physical restraint of PFC Rexroat in the Navy brig. However, upon execution of Major Williams' order, PFC Rexroat's condition legally changed from "custody" to "pretrial confinement."

The first question we must decide is whether the 48-hour time limit established in *McLaughlin* applies to the military services. The Army Judge Advocate General assumed that it did and issued guidance for implementing it. *See* 36 MJ at 712-13 n. 5. We agree that the 48-hour time limit imposed by *McLaughlin* applies to the military services.

The purpose of RCM 305 was to comply with *Gerstein* and *Courtney* and their progeny. *See* Drafters' Analysis of RCM 305, Manual, *supra* at A21-14.2 (Change 3). *McLaughlin*

refined *Gerstein* by defining the outer limits of a "prompt" review of pretrial detention. Applying the *Courtney* mandate, "[w]e discern no consideration of military necessity that would require a different rule." 1 MJ at 270.

It is important to note that *McLaughlin* merely sets up a presumption of untimely review when the 48-hour limit is exceeded. Therefore, if military exigencies prevent completion of probable-cause review within 48 hours, the fact of those exigencies may be used to rebut the presumption.

The next question is who is constitutionally qualified to conduct the review. PFC Rexroat contends that the probable-cause review must be conducted by a military magistrate. The Government contends that the review need only be made by a neutral and detached official, and that the commander's initial probable-cause determination under RCM 305(d) and the probable-cause review under RCM 305(h), both of which were accomplished within 48 hours in this case, were sufficient to satisfy *Gerstein* and *McLaughlin.*

In cases involving search authorizations, as opposed to imposition of pretrial confinement which is involved in this case, the question whether a commander may qualify as a neutral and detached magistrate has been the subject of many, often fragmented, opinions from this Court. In *United States v. Ezell,* 6 MJ 307 (CMA 1979), Judge Perry and Judge Cook held that a commander could act as a neutral and detached magistrate and issue a search authorization. In his principal opinion, Judge Perry wrote:

> We decline, however, to hold that military commanders are *per se* disqualified to act as neutral and detached magistrates. . . .
>
> In the case of *United States v. Ezell,* Number 31,304, we have determined that the commander acted as an impartial magistrate and that decision is, accordingly, affirmed."

6 MJ at 318, 310. Judge Cook wrote:

> An undeviating line of cases in this Court has acknowledged that a commanding is qualified to act as a neutral and detached magistrate to authorize a search in the military community.

6 MJ at 330. Chief Judge Fletcher had difficulty accepting a commander as a military counterpart to a civilian magistrate, but he recognized that a search authorized by a commander upon a showing of probable cause may be reasonable. 6 MJ at 330.

In *United States v. Stuckey,* 10 MJ 347 (CMA 1981), Chief Judge Everett, joined by Judge Fletcher, found a search authorization by a commander to be "reasonable." Chief Judge Everett, however, observed that, while we have "equated" a commander to a federal magistrate, a commander "cannot pass muster constitutionally as a 'magistrate' in the strict sense" and that "the commander is not a true 'magistrate.'" 10 MJ at 361.

More recently, in *United States v. Lopez,* 35 MJ 35 (CMA 1992), we decided that a commander who is neutral and detached is entitled to the same judicial deference on appellate review as a military judge when we review a search authorization for probable cause. Although there were four separate opinions in *Lopez,* a clear majority of this Court decided that the commander qualified as a neutral and detached magistrate in that case.

Our decisions involving review of pretrial confinement have dealt with review of the necessity for continued pretrial confinement, now covered by RCM 305(i) and (j), rather than the initial probable-cause determination now covered by RCM 305(d) and (h), although there is considerable dicta concerning the latter. In *Courtney v. Williams, supra,* this Court entertained a petition for extraordinary relief from a Navy prisoner who had requested the military judge to review the

propriety of his pretrial confinement. The military judge ruled that, under then-existing procedures, he had no authority to review pretrial confinement, and the petitioner asked for extraordinary relief. In a decision with three separate opinions, this Court denied relief. Chief Judge Fletcher, joined by Senior Judge Ferguson, held that no relief could be granted because the petitioner had been released from confinement. Chief Judge Fletcher examined *Gerstein v. Pugh, supra,* and the lack of bail procedures in the military and concluded that "a magistrate must decide if a person could be detained and if he should be detained." 1 MJ at 271. Although joining Chief Judge Fletcher, Senior Judge Ferguson noted that the military judge "certainly is not the only figure" with authority to review pretrial confinement. 1 MJ at 272 n. 2. Judge Cook concurred in the result, stating that a military judge had no authority to review pretrial confinement. 1 MJ at 272.

The *Gerstein* and *Courtney* opinions discuss both the initial probable-cause determination, *i.e.*, whether the person "could be detained," as well as the subsequent review of the necessity for continued pretrial detention, *i.e.*, whether the person "should be detained." Although the issue before our Court in *Courtney* dealt only with the question whether the military judge had authority to review the legality of the petitioner's pretrial confinement, Chief Judge Fletcher's dicta went beyond the issue in that he opined that a "magistrate" must determine whether the person "could be detained" as well as whether the person "should be detained." *Courtney* does not address who qualifies as a "magistrate"; the decision turns on the authority of a military judge to review pretrial confinement.

United States v. Malia, 6 MJ 65 (CMA 1978), considered the issue whether a commander could overrule the decision of a military magistrate releasing a soldier from pretrial confinement. Chief Judge Fletcher, joined by Judge Perry, held that

the commander could not overrule the military magistrate. Chief Judge Fletcher stated, "The cases which preceded *Courtney* directed necessary pretrial confinement hearings to be conducted by a judge. A magistrate by definition is a judge." 6 MJ at 66 (footnote omitted). Judge Cook dissented, repeating his assertion that the magistrate required by *Gerstein* need not be a judge. The three cases in the *Malia* footnote all involved lengthy pretrial confinement. 6 MJ at 66 n.1. In each case this Court, with Judge Cook dissenting, ordered the military judge to which the case was referred to convene a pretrial session to inquire into the legality of the pretrial confinement. *Milanes-Canamero v. Richardson*, 23 USCMA 710, 50 CMR 916 (1975); *Phillippy v. McLucas*, 23 USCMA 709, 50 CMR 915 (1975); *Porter v. Richardson*, 23 USCMA 704, 50 CMR 910 (1975). Although the *Malia* opinion contains broad language ("A magistrate by definition is a judge."), the holding extended only to the authority of a commander to overrule a military magistrate.

In *United States v. Lynch*, 13 MJ 394 (CMA 1982), the question was whether the staff judge advocate and the special court-martial convening authority were both disqualified from making the decision whether a person should remain in pretrial confinement. Judge Fletcher, joined by Chief Judge Everett, held that neither the staff judge advocate nor the convening authority qualified as a neutral and detached magistrate. In his lead opinion, Judge Fletcher stated that

> the following persons authorized by the Code to confine are constitutionally qualified as a judicial officer to make the pretrial confinement decision:
>
> First, a military judge constituted as such within the meaning of Article 26, UCMJ. 10 USC § 826.
>
> Second, a military magistrate empowered by service regulations and untainted by and unconnected with the court-martial referral process.

> Third, any other person authorized by the Code to confine whois not directly or particularly involved in the command's law enforcement function.

13 MJ at 397 (citation omitted). Judge Cook again dissented.

Although many of our prior decisions contain broad dicta arguably applying to the initial probable-cause determination, PFC Rexroat's case is the first case in which we must squarely decide who is constitutionally qualified to make and review the initial probable-cause determination.

Turning to the facts of this case, we hold that a commander is not *per se* disqualified to make the initial probable cause review required by *Gerstein*. The Supreme Court has held that a non-lawyer may be constitutionally qualified to determine whether there is probable cause to detain a person. *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). We have held that a non-lawyer may be constitutionally qualified to determine whether there is probable cause to search. *United States v. Lopez*, 35 MJ at 40. We have held that a commander is not *per se* disqualified to determine whether there is probable cause to search. *United States v. Ezell*, 6 MJ 307 (CMA 1979); *United States v. Lopez*, *supra*. We perceive no reason to treat the determination of probable cause for pretrial confinement differently from probable cause to search. Accordingly, we hold that either of the commander's probable-cause determinations required by RCM 305(d) (h) can satisfy *Gerstein* if the commander is neutral and detached, and can satisfy *McLaughlin* if conducted within 48 hours.

Major Williams' determination of probable cause for pretrial confinement was conducted within the *McLaughlin* time limits. Therefore, either of Major Williams' actions in accordance with RCM 305(d) and (h) could satisfy *Gerstein* and *McLaughlin* if Major Williams was neutral and detached. The charge sheet reflects that he was not the formal accuser in this case. The initial detention of PFC Rexroat was by security

personnel at Pearl Harbor and was not at Major Williams' direction. Thus Major Williams was not reviewing his own decision when he made his RCM 305(d) determination. Whether he was otherwise involved in the case against PFC Rexroat cannot be determined from the record. Accordingly, we are unable to determine if Major Williams was constitutionally qualified to perform the initial probable-cause determination required by *Gerstein* and RCM 305(d).

We turn next to the probable-cause review conducted by LTC Randall. The record reflects that LTC Randall had no prosecutorial or law enforcement role in this case. We are satisfied, as was the military judge and the court below, that he was neutral and detached; however, as the court below found, LTC Randall was not authorized by Army Regulations to perform the RCM 305(i) review. *See* 36 MJ at 714. Furthermore, since LTC Randall was not PFC Rexroat's commander, he was not authorized to perform the RCM 305(h) review. Nevertheless, the record shows no legal impediment to LTC Randall's conducting the probable-cause review required by *Gerstein*. While RCM 305 establishes specific procedures for reviewing pretrial confinement, it does not prohibit additional procedures not specifically required by RCM 305, such as LTC Randall's independent review. As a commissioned officer LTC Randall was empowered to order PFC Rexroat into confinement. Art. 9(b); RCM 304(b)(2). LTC Randall was not "directly or particularly involved in the command's law enforcement function." *United States v. Lynch*, 13 MJ at 397. Therefore, we hold that LTC Randall's independent review of the probable cause for pretrial confinement complied with *Gerstein*, *Courtney*, and *Lynch*, and was completed within the time limits imposed by *McLaughlin*.

The review by the military magistrate, Major Hudson, complied with RCM 305(i) and satisfied the *Courtney* requirement for a "bail" hearing. While Major Hudson was constitutionally

qualified to conduct the initial probable-cause review required by *Gerstein*, his review does not satisfy *McLaughlin* because it was not completed within 48 hours.

PFC Rexroat argues that the RCM 305(i) review is the only "authorized" probable-cause review and that, because it did not comply with *McLaughlin* in this case, he is entitled to relief. We disagree. RCM 305(d), (h), (i), and (j) all provide for a probable-cause review, any one of which, if conducted by a neutral and detached official within 48 hours, would satisfy *Gerstein* and *McLaughlin*.

PFC Rexroat also cites the Drafters' Analysis of RCM 305 for the proposition that RCM 305(c), (d), and (h) were not intended by the President to be the *Gerstein* review. We reject this argument for two reasons. First, the Drafters' Analysis is a reflection of the drafters' intent, not necessarily the President's. *See* Drafters' Analysis, Introduction, Manual, *supra* at A21-3 ("[I]t is important to remember that the Analysis solely represents the views of staff personnel who worked on the project, and does not necessarily reflect the views of the President in approving it, or of the officials who formally recommended approval to the President."). Second, even if the President intended RCM 305(i) to be the *Gerstein* review, that intent does not preclude some other probable-cause review from satisfying *Gerstein*.

In summary, we hold that Major Williams complied with RCM 305(d) and (h). If he was neutral and detached, he also complied with *Gerstein* and *McLaughlin*, but we cannot tell from the record whether he qualified as a neutral and detached commander. Nevertheless, LTC Randall's independent review satisfied *Gerstein* and *McLaughlin*, even if Major Williams compliance with RCM 305(d) and (h) did not. Major Hudson's review satisfied RCM 305(i). Therefore, since *Gerstein*, *McLaughlin*, and RCM 305 all were satisfied, PFC Rexroat is not entitled to relief.

The certified questions are answered in the negative.

The decision of the United States Army Court of Military Review is reversed to the extent that it grants PFC Rexroat 5 days of credit for illegal pretrial confinement. In all other respects the decision below is affirmed.

Judge CRAWFORD, concurs.

APPENDIX

Extract of RCM 305,
Manual for Courts-Martial, United States, 1984

Rule 305. Pretrial Confinement

* * *

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

* * *

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report

that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

* * *

(i) *Procedures for review of pretrial confinement.*

(1) *In general.* A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

* * *

(j) *Review by military judge.* Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

* * *

(k) *Remedy.* The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

WISS, Judge (concurring):

I fully concur in the principal opinion. I recognize, as Judge Cox points out, that good commanders *care* about their units and the welfare of the men and women in them. In fact, it was this recognition that a commander is not thoroughly, third party disinterested that underlay my separate opinion in *United States v. Lopez*, 35 MJ 35, 49 (CMA 1992).

The perhaps-unstated, but certainly implied, distinction at the heart of my *Lopez* opinion, however, is between caring about the unit's welfare and the impact on it in a very general sense from criminal-justice matters, on the one hand, and caring in th emore direct sense specifically about the criminal-justice matter then on his or her desk, on the other. *See id.* at 51. It is this same distinction, I believe, that is the foundation

of the decision in *United States v. Stuckey,* 10 MJ 347 (CMA 1981), in the context of whether a commander's search authorization based on probable cause was "reasonable." *See* 35 MJ at 51. It also is the same distinction at the foundation of the decision in *United States v. Ezell,* 6 MJ 307 (CMA 1979), which addressed circumstances under which a commander could be constitutionally seen as neutral and detached, again for purposes of issuing a search authorization.

The principal opinion here reflects the same concern about the RCM 305(d), Manual for Courts-Martial, United States, 1984, confinement decision by a commander that I expressed about that officer's probable-cause determination in my separate opinion in *Lopez.* So long as the commander who makes the probable-cause decision mandated by *Gerstein/McLaughlin*[1] is neutral and detached in the latter sense referred to earlier—that is, in the sense of the commander's interest and role as the commander in connection with the criminal offense allegedly committed by the accused—then the pretrial confinee's constitutional safe-guards are met in that regard. The remainder of the scheme of reviewing both the "could" and "should" confinement decisions in RCM 305, all together, fully assure that a military accused will not be held in pretrial confinement without due process.[2]

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[1] *Gerstein v. Pugh,* 420 U.S. 103 (1975); *County of Riverside v. McLaughlin,* 500 U.S. ___, 111 S.Ct. 1661 (1991).

[2] Magistrate review of pretrial confinement is one of the factors pointed to by the majority in *United States v. Kossman,* No. 93-6002, ___ MJ ___ (CMA 1993), that reassured the majority there that there was no continued need for the speedy-trial standard of *United States v. Burton,* 21 USCMA 112, 44 CMR 166 (1971). More specifically, the *Kossman* majority trumpeted the scheme under which magistrates and judges, not just commanders, now have the keys to the jailhouse. If this building block in the rationale of the majority in that case is to have substance and not just appearance, there can be no dilution of the full panoply of those safeguards that are set out in RCM 305, and neither can there be any

COX, Judge (concurring in the result):

I agree that a commanding officer can determine if there is probable cause to place a member of his command in pretrial confinement. I further agree that this must be done "prompt[ly]," *i.e.*, within 48 hours. *County of Riverside v. McLaughlin*, 500 U.S. ___, 111 S.Ct. 1661 (1991). However, unlike the majority, I would presume regularity; that is, the commander is always qualified to make the decision unless his personal interest in the case disqualifies him. The burden should be on the accused to challenge the commander's qualifications.

The term "neutral and detached commander" is an oxymoron. *See United States v. Lopez*, 35 MJ 35, 42 (CMA 1992) (Cox, J., concurring with modest reservations).

Why not recognize that the military commander is statutorily and constitutionally charged with the responsibility for the morale and discipline of those within the command? Absent evidence to the contrary, we should give full faith and credit to his or her performance of those duties of command and quit trying to force a square peg into a round hole. *See United States v. Morris*, 28 MJ 8, 14 (CMA 1989) (Cox, J., concurring in part and dissenting in part).

SULLIVAN, Chief Judge (concurring in part and dissenting in part):

The commander who initially ordered pretrial confinement is not a neutral and detached magistrate for purposes of *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of River-*

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cutting corners when it comes to determining whether a commander who makes the *Gerstein/McLaughlin* decision truly is neutral and detached under the facts of the case; there simply cannot be any tendency toward a this-is-close-enough approach.

side v. McLaughlin, 500 U.S. ___, 111 S.Ct. 1661 (1991). *See United States v. Malia*, 6 MJ 65, 66-67 (CMA 1978). This Court's decision in *United States v. Lynch*, 13 MJ 394 (CMA 1982), did not alter this precedent. To the extent that this Court undermines these decisions and affirms on this basis, I dissent. Otherwise I agree with the approach of the majority.

APPENDIX B

DEPARTMENT OF THE AIR FORCE **AF REGULATION 111-1**
Headquarters US Air Force
Washington DC 20330-5000 **30 September 1988**

Military Justice

MILITARY JUSTICE GUIDE

This publication has been prepared to assist judge advocates and other Air Force personnel in the administration of military justice. It contains Department of the Air Force implementation of the Manual for Courts-Martial, 1984. It applies to all personnel involved in the administration of military justice in the Air Force, including the US Air Force Reserve. It does not apply to Air National Guard units and members, unless called into Federal Service. Send any suggestions or recommendations for changes to HQ USAF/JAJM, Bolling AFB DC 20332-6128.

For a complete list of abbreviations, see attachment 1.

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Chapter 4

PRETRIAL RESTRAINT AND PREFERRAL

4-1. Preliminary Inquiry Into Reported Offenses. SJAs should provide commanders with advice whenever the commander is conducting a preliminary inquiry into charges or suspected offenses under the provisions of R.C.M. 303. The advice of the SJA need not be limited to the question of whether trial by court-martial is appropriate. Where it appears that initiation of board proceedings or other administrative action may be proper, the advice should recommend such disposition.

Section A—Pretrial Restraint

4-2. Pretrial Confinement:

a. General Information. When an Air Force member is placed in pretrial confinement, the appropriate officer exercising SPCM or GCM jurisdiction will direct that a review be made to determine whether the pretrial confinement should be continued. In cases overseas where an Air Force member is confined at the request of host nation authorities, refer to AFR 110-25 and *United States v. Murphy,* 18 M.J. 220 (C.M.A., 1984), for guidance on conducting a hearing concerning the appropriateness of continued confinement. See MCM, 1984, R.C.M. 305(g) for who can release an individual from pretrial confinement.

(b) Advisement of Confinee. Each person confined shall be promptly informed of:

(1) The nature of the offense(s) for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed. SJAs should ensure confinement personnel have performed this advisement, using AF Form 444, Advisement of Rights Upon Pretrial Confinement, or other locally devised form.

c. Action by Commander:

(1) Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue. See MCM, 1984, R.C.M. 305(h). The commander shall approve continued confinement or order immediate release.

(2) If the commander determines that continued pretrial confinement is warranted, the commander of the person confined will prepare a written memorandum which states the reason pretrial confinement is appropriate. See MCM, 1984, R.C.M. 305(h)(2)(c). Though no particular form for this memorandum is prescribed, the sample in figure 4-1 is recommended. The memorandum will be submitted by the prisoner's commander for use by the reviewing officer appointed according to d. below.

d. Reviewing Officers:

(1) If the unit commander approves continued pretrial confinement, the convening authority will refer the case to a reviewing officer, who may be a military judge if one is made available by the chief circuit military judge; or, if a military judge is not made available, a military magistrate.

★(2) The convening authority may appoint by letter order, in advance, a reasonable number of officers as military magistrates. Military magistrates should be mature officers, should not be judge advocates assigned to the convening authority's legal staff, and must have no connection with the

court-martial referral process or the law enforcement function. *See also, United States v. Beaver,* 26 M.J. 991, (A.F.C.M.R. 1988). Officers appointed to serve as military magistrates should be briefed concerning their duties by a judge advocate at the time of their appointment and whenever appropriate thereafter.

e. Procedures. The following procedures apply to the pretrial confinement review:

(1) Unless a delay is granted in response to a request by the prisoner or his or her counsel, the pretrial confinement review will be completed and the reviewing officer's decision reported within 7 days of the imposition of confinement. Requests for delay should be in writing.

(2) The prisoner and counsel, if any, should be allowed to attend the review unless overriding circumstances or time constraints dictate otherwise. See *United States v. Butler,* 23 M.J. 702 (A.F.C.M.R., 1986); *United States v. Duke,* 23 M.J. 710 (A.F.C.M.R., 1986), MCM, 1984, R.C.M. 305(i)(3)(A).

(3) The review may be held at any place convenient for the reviewing officer and witnesses. If securities requires, the review may be conducted in the confinement facility or other secure place.

(4) The reviewing officer may consider written matters submitted by the prisoner, counsel, the commander, confinement authorities, and any other appropriate individuals. The prisoner and counsel, if any, shall be given the opportunity to appear before the reviewing officer and make a statement or present evidence, if practicable, considering (1) and (2) above. A representative of command may also appear before the reviewing officer to make a statement.

(5) The review is not an adversary proceeding. If the prisoner and or counsel attend the review, they have no right to cross-examine witnesses.

(6) Except for Mil. R. Evid., Section V and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to matters considered during the review.

f. Upon completion of the pretrial confinement review, the reviewing officer will determine whether there is adequate probable cause, that is, reasonable, grounds to believe that:

(1) An offense triable by court-martial has been committed.

(2) The prisoner committed it.

(3) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, and less severe forms of restraint are inadequate; or

(b) The prisoner will engage in serious criminal misconduct (MCM 1984, R.C.M. 305(h)(2)(b), and less severe forms of restraint are inadequate. Such findings must be supported by a preponderance of the evidence to continue pretrial confinement. Factors to be considered in making the findings are found at MCM, 1984, R.C.M. 305(h)(2), Discussion. The reviewing officer may either approve continued pretrial confinement of the accused or order his or her immediate release.

g. If the reviewing officer decides that the prisoner should be released, the reviewing officer will order the prisoner released. Within 24 hours of the report of decision, the reviewing officer shall provide the convening authority with a written memorandum of the reviewing officer's conclusions and the factual findings on which they are based. A copy of all documents considered by the reviewing officer and summaries of all oral statements made to the reviewing officer will be attached to the memorandum. One copy of the memorandum, with attachments, will be provided to the accused on request. If appropriate, the SJA should notify the victim of the accused's pretrial release. See paragraph 11-12.

h. The reviewing officer may not impose conditions on release from confinement.

i. If the reviewing officer decides that the prisoner should remain in pretrial confinement, this decision will be reported to the convening authority. Within 24 hours of the report of decision, the reviewing officer shall provide the convening authority, the convening authority's SJA, the confinement officer, and the prisoner with a written memorandum of the reviewing officer's conclusions and the factual findings on which they are based. A copy of all documents considered by the reviewing officer and summaries of all oral statements made to the reviewing officer will be attached to the memorandum.

j. Circumstances of persons who, after initial release by a convening authority, are reconfined will be reviewed by a reviewing officer (preferably the same officer who conducted the initial review). The determination whether continued pretrial confinement is warranted will be made on the same legal basis as the review and determination for initial pretrial confinement.

k. Once the charges for which the prisoner has been confined are referred to trial, the military judge may review the propriety of pretrial confinement upon a motion of appropriate relief.

4.3. Pretrial Restraint Upon Release From Confinement. The commander concerned may impose any authorized pretrial restraint deemed necessary on a person released from confinement by the reviewing officer. However, the commander may not order the return of that person to pretrial confinement except when an additional offense is committed or on receipt of newly discovered information (See R.C.M. 305(i)). (See paragraph 4-2.)

j. AFR 35-40, Military Personnel Strength Accounting Methods.

k. AFR 35-54, Appointment to and Assumption of Command.

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am. AFR 124-18, Technical Surveillance Activities for Law Enforcement Purposes.

an. AFR 125-3, Security Police Handbook.

ao. AFP 125-8, The USAF Centralized Corrections and Rehabilitation Programs.

ap. AFR 125-18, Operation of Air Force Correction and Detention Facilities.

aq. AFR 125-30, Military Sentences to Confinement.

ar. AFR 125-35, Correctional Custody.

as. AFR 160-42, Psychiatry in Military Law.

at. DA Pamphlet 27-9, Military Judges' Bench Book.

NOTE: The above list is not intended to be exhaustive. Ensure that directives used are current and applicable.

★BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

LARRY D. WELCH, General USAF
Chief of Staff

WILLIAM O. NATIONS, Colonel, USAF
Director of Information Management
and Administration

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No. 93-1022

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WESLEY M. REXROAT, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DAVID P. SHELDON
Lieutenant,
Judge Advocate General's Corps,
U.S. Naval Reserve
Counsel of Record

TIMOTHY C. YOUNG
Commander,
Judge Advocate General's Corps,
U.S. Navy
Counsel for Amicus Curiae

PAUL J. FERDENZI
Lieutenant,
Judge Advocate General's Corps,
U.S. Naval Reserve
Counsel for Amicus Curiae

NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington Navy Yard
Building 111
Washington, D.C. 20374-1111
(202) 433-4161

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INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents Navy and Marine Corps personnel on appellate review of court-martial convictions[1] who have the same interest as petitioner, Wesley M. Rexroat. This Division represented Private First Class Jonathan Holloway who challenged the same issue as petitioner, but the lower court remanded his case for further consideration. *United States v. Holloway*, 38 M.J. 302 (C.M.A. 1993). Unless this Honorable Court grants the petition for *certiorari* in the *Rexroat* case, the Court of Military Appeals' ruling in *Rexroat* will govern the outcome of future cases. Because a service member has a right to petition the Supreme Court for *certiorari* only if the Court of Military Appeals exercises its discretionary jurisdiction to

[1] Pursuant to Rule 37 of the Rules of this Honorable Court, *amicus curiae* filed letters of consent from both parties in this matter.

review the case,[2] these service members may never have an opportunity to seek review of the issue presented in the *Rexroat* case. As such, this division has an interest as an amicus curiae in the outcome of this case.

ARGUMENT

The lower court misapplied *Gerstein v. Pugh*,[3] by failing to require a *judicial* determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. *Gerstein*, 420 U.S. at 124-25. This is evidenced by the court's conclusion that a military commander can make the required "neutral and detached" review of an initial probable cause detainment. In fact, the lower court's decision is much broader as it applies in the Navy and Marine Corps. In *Holloway*, the court ruled that either the commanding officer's ordering an accused into confinement or his review of a subordinate's decision to detain an accused, satisfies *Gerstein* and *County of Riverside v. McLaughlin*[4] as long as it occurs within 48 hours. *Holloway*, 38 M.J. at 303.

That ruling conflicts with the *Gerstein* court's realization that:

> Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. *And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly.*

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[2] 10 U.S.C.A. § 867a (West Supp. 1992); 28 U.S.C.A. § 1259 (West Supp. 1991).

[3] 420 U.S. 103 (1975).

[4] 500 U.S. 44 (1991).

Gerstein, 420 U.S. at 114 (emphasis added). Essentially *Gerstein* sets forth the basic principle that "the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest." 420 U.S. at 114 (emphasis added). *Gerstein* ensures that the police or government entity have "clean hands"[5] by having a safeguard, a neutral and detached individual who makes a subsequent review of the initial warrantless arrest. The practical effect of the lower court's ruling is to equate a commanding officer's decision to detain an accused to a federal magistrate's power to issue a warrant. The *Gerstein* Court was concerned about withholding the fundamental right to liberty without due process of law. Thus, in *Gerstein*, the Court mandated that a *judicial* review be done within a "prompt" period[6] of time after the accused has been apprehended and placed into confinement. 420 U.S. at 114.

Fundamentally, *Gerstein* holds that the neutral and detached reviewer cannot be anyone who has a prosecutorial or law enforcement role. 420 U.S. at 112, 118, *in accord with, Johnson v. United States*, 333 U.S. 10, 13-14 (1948). In the military, however, a commanding officer is "predisposed in his pretrial confinement decision to a particular interest of law enforcement within his command." *United States v. Lynch*, 13 M.J. 394, 396 (C.M.A. 1982). Under the court's ruling below,

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[5] For years, this Court's concern over police misconduct in the execution of official law enforcement roles centered around Fourth Amendment search and seizure scenarios. *See Mapp v. Ohio*, 367 U.S. 643 (1961) and *Cf. United States v. Leon*, 468 U.S. 897 (1984). The basis of the exclusionary rule is anchored in this Court's concern with the essence of "clean hands" by the government. *See generally, Leon*, 468 U.S. at 898.

[6] *Riverside* clarified that "prompt" meant within 48-hours absent some exigent circumstances. 500 U.S. at ___, 111 S. Ct. at 1670.

the commanding officer, the same individual who orders the service member into confinement pursuant to his law enforcement office and in many cases determines whether or not to prosecute the individual, makes the requisite "neutral and detached" probable cause determination.[7] Such a conclusion is tantamount to the fox guarding the hen house. Furthermore, it belies and, in fact, eviscerates the very protection guaranteed under *Gerstein* and its progeny.

Gerstein represents a fundamental truth: when detaining some individuals, a certain percentage of those individuals are unjustly confined. These persons deserve to be released as quickly as possible. "[T]he practice of arbitrary imprisonments, has been, in all ages, the favorite and most formidable instruments of tyranny." *The Federalist Papers*, No. 84, at 511-12 (Alexander Hamilton) (New American Library 1961). Confining an individual for an undue length of time, however brief the time seems, challenges seminal constitutionally-protected liberties. An expeditious probable cause determination by a neutral and detached party provides an essential protection to that person from being arbitrarily imprisoned.

Certainly a commander, who is "admittedly predisposed in his pretrial confinement decision to a particular interest of law enforcement within his command,"[8] will likely believe that he has probable cause to detain an individual he suspects

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[7] In so ruling, the court reversed its earlier precedents which had disqualified a commanding officer as acting as the judicial officer in making a pretrial confinement determination. *Lynch*, 13 M.J. at 1962 (holding that a person performing magisterial duties must be neutral and detached from the law enforcement and prosecution system itself); *United States v. Malia*, 6 M.J. 65 (C.M.A. 1978) (recognizing the subordinate relationship the commanding officer has with regard to the initial review officer); *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976) (ruling that a neutral party must review a commander's probable cause determination).

[8] *Lynch*, 13 M.J. at 396.

of a crime. Just like the police officers in *Gerstein*, a commanding officer, who has already ordered an arrest, presumably will believe that he has probable cause to detain that individual. A neutral and detached official is a check on the government's power to detain an accused. It is the wrongly incarcerated who are protected by *Gerstein*. The Court of Military Appeals' ruling, however, permits the *Gerstein* review, not by a "neutral and detached" individual, but by an individual who exercises a degree of concern and authority unmatched in any other forum. This disqualifies him from making the neutral and detached determination which *Gerstein* requires.

CONCLUSION

This Court should grant *certiorari* to determine whether a military commander can ever make a judicial determination required under *Gerstein*.

Respectfully submitted,

DAVID P. SHELDON
Lieutenant,
Judge Advocate General's Corps,
U.S. Naval Reserve
Counsel of Record

TIMOTHY C. YOUNG
Commander,
Judge Advocate General's Corps,
U.S. Navy
Counsel for Amicus Curiae

PAUL J. FERDENZI
Lieutenant,
Judge Advocate General's Corps,
U.S. Naval Reserve
Counsel for Amicus Curiae

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Building 111
Washington Navy Yard
Washington; D.C. 20374-1111
(202) 433-4161

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

DAYTON M. CRAMER
Colonel, USA

JAMES L. POHL
Major, USA

GLENN L. KIRSCHNER
Captain, USA

Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

QUESTION PRESENTED

Whether review of the probable cause to confine petitioner, conducted by an independent military commander within 48 hours of petitioner's detention, satisfied the Fourth Amendment principles announced by this Court in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1022

WESLEY M. REXROAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-19a, is reported at 38 M.J. 292. The opinion of the Army Court of Military Review, Pet. App. 20a-42a, is reported at 36 M.J. 708.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 29, 1993. The petition for a writ of certiorari was filed on December 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (1988 & Supp. IV 1992).

STATEMENT

1. While facing punishment pursuant to Article 15, UCMJ, 10 U.S.C. 815,[1] for being absent from his unit without authority, petitioner again fled his unit without authority. PX 1, at 2. Petitioner's unauthorized absence ended on June 26, 1991, when military police apprehended him at the Pearl Harbor, Hawaii, Base Exchange attempting to steal approximately $700 worth of electronics equipment. *Ibid.* Petitioner remained in police custody until his commander, Major Williams, ordered him into pretrial confinement on June 27, 1991, in accordance with Rule 305(d) of the Rules of Courts-Martial (R.C.M.).[2] Pet. App. 3a, 21a.

On June 28, 1991, within 48 hours of petitioner's arrest, Lieutenant Colonel Randall, a unit commander not in petitioner's chain of command, conducted an independent review of the probable cause supporting petitioner's confinement. Tr. 195. Colonel Randall had no prior knowledge of the case and was not involved in the investigation or prosecution of petitioner. Pet. App. 3a-4a. At

[1] Article 15, UCMJ, authorizes commanders to impose nonjudicial punishment on soldiers for minor offenses. Punishment may consist of, *inter alia*, a reduction in rank, temporary forfeiture of a portion of pay, geographic restriction, and performance of extra duty.

[2] R.C.M. 305(d) provides as follows:

> *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:
>
> (1) An offense triable by court-martial has been committed;
>
> (2) The person confined committed it; and
>
> (3) Confinement is required by the circumstances.

trial, petitioner did not challenge Colonel Randall's neutrality and impartiality. Indeed, he stipulated at trial that Colonel Randall "conducted a `neutral and detached review of probable cause to place [petitioner] in pretrial confinement' [and] concluded that probable cause to believe [petitioner] committed UCMJ offenses existed." AX 5, at 1; Tr. 184; Pet. App. 4a, 21a.

Major Williams subsequently reviewed petitioner's confinement in accordance with R.C.M. 305(h).[3] In a

[3] R.C.M. 305(h) provides, in pertinent part, as follows:

Notification and action by commander.

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

written memorandum dated July 3, 1991, he found both probable cause and a need for continued confinement. Pet. App. 4a. Then, also on July 3, 1991, Major Hudson, a military magistrate, conducted a hearing pursuant to R.C.M. 305(i).[4] Petitioner was represented by counsel at the hearing. Major Hudson found probable cause and determined that continued confinement was warranted as petitioner posed a demonstrated flight risk and other forms of restraint were inadequate. AX 5, at App. 3; Pet. App. 4a, 21a.

2. On August 1, 1991, Major S[illegible]een (Major Williams' successor in command) formally charged petitioner with attempted larceny, two specifications of absence without

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(*a*) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(*b*) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

* * * * *

(C) *Memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. * * *

[4] Rule 305(i) reads, in pertinent part, as follows:

Procedures for review of pretrial confinement.

(1) *In general.* A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of imposition of confinement.

(2) *By whom made.* The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

leave, and 41 specifications of uttering worthless checks, in violation of Articles 80, 86, and 123a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 886, and 923a. Pet. App. 4a, 20a. Petitioner pleaded guilty to the charges and was sentenced to a bad conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to the lowest enlisted rank.

Before the military judge, petitioner claimed that he was entitled to five days of additional confinement credit because he had been illegally confined for that period. He argued that the government had failed to provide a timely review of his pretrial confinement in accordance with the standards set forth by this Court in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991). Petitioner argued that a military magistrate's review pursuant to Rule 305(i) is the only means by which the government can satisfy its responsibilities under *Gerstein* and *McLaughlin*, and that the Rule 305(i) probable cause review by Major Hudson did not take place until July 3, seven days after petitioner was first confined. That determination was untimely under *McLaughlin*, petitioner argued, since it did not take place within 48 hours of his arrest. The trial judge rejected petitioner's argument, holding that the neutral and detached review of probable cause conducted by Colonel Randall within 48 hours of petitioner's confinement satisfied the *Gerstein-McLaughlin* requirement for a timely probable cause review. Tr. 195-196.

3. On September 22, 1992, a three-judge panel of the Army Court of Military Review held that, in order to satisfy the *Gerstein-McLaughlin* requirement of a timely review of probable cause to confine an accused pending trial, a review within 48 hours of confinement must be conducted by a military magistrate pursuant to R.C.M. 305(i). The government petitioned the Army

Court of Military Review for *en banc* reconsideration of the panel's ruling. The en banc court granted reconsideration, but then ruled, by a divided vote, that the panel was correct in holding that a magistrate's review under R.C.M. 305(i) is the only way to satisfy the 48-hour review requirement of *McLaughlin* as applied to the military justice system. Pet. App. 20a-42a.

4. The Judge Advocate General of the Army certified the case for review by the Court of Military Appeals pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. 867(a)(2) (Supp. IV 1992). The Court of Military Appeals then reversed the decision of the Army Court of Military Review. Pet. App. 1a-19a.

The Court of Military Appeals held that Colonel Randall conducted a neutral and detached probable cause review within 48 hours of petitioner's detention. Although that review did not satisfy R.C.M. 305(i), because Colonel Randall was not authorized by service regulations to conduct the R.C.M. 305(i) review, the court held that Colonel Randall's review "was not prohibited by law or regulation; was conducted within the time limits established by *McLaughlin*; and was therefore sufficient to satisfy *Gerstein* and *McLaughlin*." Pet. App. 3a.

The court explained that the probable cause determinations required by R.C.M. 305(d) and 305(h) can satisfy *Gerstein* and *McLaughlin*, provided the commander who conducts the review is neutral and detached and the review is conducted within 48 hours of confinement. Reasoning from its decisions holding that commanders could be "neutral and detached" for purposes of issuing search authorizations, Pet. App. 8a, the court held that a commander "is not *per se* disqualified to make the initial probable cause review required by *Gerstein*." Pet. App. 11a. Rather, the commander's determination is sufficient to satisfy *Gerstein* "if the commander is neutral

and detached, and can satisfy *McLaughlin* if conducted within 48 hours." *Ibid.* Accordingly, because the matter of probable cause to confine petitioner was reviewed within 48 hours of confinement by a neutral and detached officer, the Court of Military Appeals denied petitioner relief.[5]

ARGUMENT

1. Petitioner contends that the probable cause review conducted by Colonel Randall within 48 hours of petitioner's confinement was insufficient to satisfy the Fourth Amendment.

The Fourth Amendment requires that a person arrested without a warrant be given a prompt judicial determination of probable cause as a prerequisite to pretrial detention. That review can be conducted in a nonadversary proceeding, and on a written submission. *Gerstein* v. *Pugh*, 420 U.S. at 120. As this Court recently held, however, an initial probable cause determination is presumptively untimely if it is made more than 48 hours after arrest. *County of Riverside* v. *McLaughlin*, 111 S. Ct. at 1670.

In this case, it is undisputed that a probable cause review was conducted by Colonel Randall within 48 hours of petitioner's confinement. It is also undisputed that the probable cause review conducted by Colonel Randall was not the probable cause review provided for by R.C.M. 305(i). The question presented here is therefore a nar-

[5] The court did not find it necessary to make a determination whether Major Williams, the commanding officer who made the first probable cause determination under R.C.M. 305(d), was "neutral and detached," as it found that Colonel Randall, who made the second probable cause determination within 48 hours of petitioner's arrest, was sufficiently neutral and detached to satisfy Fourth Amendment standards.

row one—whether Colonel Randall was sufficiently neutral and detached to make a valid determination of probable cause for purposes of the Fourth Amendment.

a. Petitioner argues that, because Colonel Randall's probable cause review did not strictly comport with the procedures prescribed by Rule 305 of the Rules for Courts-Martial, it could not satisfy the 48-hour rule of *McLaughlin*. He argues that Rule 305 was intended to satisfy, *inter alia*, the requirement for a review of probable cause to confine as discussed by this Court in *Gerstein*. Accordingly, petitioner argues, the procedures found in Rule 305 are the exclusive means by which the government can satisfy *Gerstein* and *McLaughlin*.

The Court of Military Appeals properly rejected that argument and held that Rule 305 is not the only means by which the government can provide a prompt probable cause determination in accordance with the 48-hour rule of *McLaughlin*. Pet. App. 12a.[6] The Court observed that, although R.C.M. 305 was designed to comply with *Gerstein*,[7] the government is not thereby precluded from satisfying *Gerstein* and *McLaughlin* in other ways. Pet. App. 13a. Colonel Randall was not involved in the command's law enforcement function, and the Court of Military Appeals concluded that he was neutral and detached. *Id.* at 12a. Moreover, Colonel Randall's probable cause review was conducted within 48 hours of petitioner's detention. Accordingly, the probable cause determination

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[6] Rule 305 is a multi-tiered rule which provides for no less than three probable cause determinations, any one of which can satisfy *Gerstein* and *McLaughlin*, provided the determination is made by a neutral and detached officer within 48 hours of detention. See Pet. App. 11a.

[7] See Drafters' Analysis of Rule 305, *Manual for Courts-Martial, United States*—1984, at A21-14.2 (Change 3).

in the instant case complied fully with *Gerstein* and *McLaughlin*.[8]

b. Petitioner contends that military commanders should be *per se* disqualified from making probable cause determinations. He argues that commanders, solely by virtue of their status, are *de facto* law enforcement officials and, accordingly, incapable of being neutral and detached. That assertion runs contrary to both statutory and precedential authority.

This Court has consistently recognized that the military is a specialized society separate from civilian society. *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). Within that separate society, military officers, including nonjudicial officers, have long played significant roles in the administration of military criminal justice. *Weiss* v. *United States*, No. 92-1492 (Jan. 19, 1994), slip op. 7, 10. Some of those roles have involved issuing search authorizations, see Mil. R. Evid. 315; *United States* v. *Ezell*, 6 M.J. 307 (C.M.A. 1979); *United States* v. *Lopez*, 35 M.J. 35 (C.M.A. 1992); ordering the arrest or pretrial confinement of service members, see Article 9, UCMJ, 10 U.S.C.

[8] Colonel Randall's 48-hour review was conducted under the authority of a May 1991 directive from the Army Judge Advocate General, which instructed military legal officers that in the aftermath of *McLaughlin*, staff judge advocates "should ensure that pretrial confinement determinations are subject to a neutral and detached probable cause review within 48 hours." See Pet. App. 26a n.5. One of the methods devised to achieve that end was to have a "neutral and detached commander (not an accuser) * * * review the probable cause determination." *Ibid.* The directive made clear that the proposed methods for satisfying the *McLaughlin* 48-hour review requirement "are not intended as substitutes for review procedures currently required by the Manual for Courts-Martial [and other regulations]. They are offered only as suggestions to facilitate complying with the Supreme Court's 48 hour requirement." *Ibid.*

809; R.C.M. 304(b); and reviewing the propriety and necessity of continued confinement pending trial, see R.C.M. 305(h). When commanders have exercised those powers, the courts have demanded that they be neutral and impartial. See *United States* v. *Sharrock*, 32 M.J. 326, 333 (C.M.A. 1991) (Everett, S.J., concurring in part and dissenting in part); see also *United States* v. *Lopez*, *supra* (commander who is neutral and detached is entitled to the same judicial deference on appellate review as a military judge when appellate courts review a search authorization for probable cause). At the same time, the military courts have rejected the argument that military commanders are inherently part of the military law enforcement system and therefore cannot be sufficiently neutral and detached to make determinations such as the probable cause determination necessary to authorize a search in the military community. See Pet. App. 7a-8a (reviewing authorities).[9]

In light of the role of military officers in performing other, analogous functions in the military justice system, the Court of Military Appeals properly found no systemic error in permitting a military commander not in the defendant's chain of command to make a probable cause determination as to the legitimacy of his pretrial detention. Moreover, with respect to the specifics of petitioner's case, the Court of Military Appeals found noth-

[9] Although Colonel Randall was not a lawyer, that fact is without constitutional significance. This Court has held that a nonlawyer may be constitutionally qualified to determine whether there is probable cause to detain a person. *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972). The key to qualification is not whether the individual is a "judicial officer," "magistrate," "clerk," or other official, but whether the individual making the probable cause determination is "neutral and detached, and * * * capable of determining whether probable cause exists." *Id.* at 350.

ing in the record to suggest that Colonel Randall was not sufficiently neutral and detached to make a constitutionally valid probable cause determination. Indeed, the fact that each of the officers who examined the case before trial reached the same conclusion—including the military magistrate who made a probable cause determination five days later, and the fact that petitioner admitted his guilt of the charges against him, confirms that Colonel Randall's assessment of probable cause was correct. Accordingly, there is no reason for further review of the decision of the Court of Military Appeals, which holds that military commanders are not per se ineligible to make probable cause determinations that satisfy *Gerstein* and *McLaughlin*, while at the same time recognizing that any accused remains free to attack the probable cause determination of a reviewing officer on the basis that the officer who made the determination in his case was not neutral and detached.

2. Petitioner also argues (Pet. 12-14) that the Court of Military Appeals, by holding that Colonel Randall's probable cause review satisfied *Gerstein* and *McLaughlin*, engaged in an unlawful usurpation of presidential authority, as delegated by Congress, to prescribe pretrial, trial, and post-trial procedures. See Article 36, UCMJ, 10 U.S.C. 836 (1988 & Supp. IV 1992). That assertion is meritless.

The Court of Military Appeals did not hold that the government need not comply with the requirements of R.C.M. 305. Nor did the court promulgate new procedures to be substituted for those embodied in R.C.M. 305. Rather, the court simply determined that the additional probable cause review conducted in petitioner's case by Colonel Randall satisfied the requirements of *Gerstein* and *McLaughlin*. The opinion leaves intact, in their entirety, the requirements announced in the various sub-

sections of R.C.M. 305. It merely holds, in effect, that the Army Judge Advocate General did not violate any constitutional, statutory, or regulatory principles when authorizing commanding officers to conduct 48-hour probable cause reviews in the aftermath of *McLaughlin*, when probable cause determinations by military magistrates under Rule 305(i) could not be performed within the 48-hour period.

Petitioner's argument reduces to the claim that the *Gerstein-McLaughlin* rule must be satisfied by the particular procedures that have been set up to make probable cause determinations. Because Rule 305(i) was the means designed to satisfy the *Gerstein* probable cause requirement, and because the Rule 305(i) determination in this case was made well after the expiration of the 48-hour period prescribed in *McLaughlin*, petitioner suggests that it was somehow improper to satisfy the constitutional requirement by a procedure other than the one prescribed by existing rules. But that misapprehends what *Gerstein* and *McLaughlin* require: they are not designed to test the adequacy of the procedural rules in force in various jurisdictions; instead, they hold simply that an accused who is confined before trial is entitled to a probable cause review by a neutral and detached officer within 48 hours. Petitioner received such a review in this case; it is irrelevant to the Fourth Amendment, or any other constitutional right of the defendant, whether that review occurred within the aegis of Rule 305 or under the authority of a regulation designed to supplement Rule 305 in light of *McLaughlin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DAYTON M. CRAMER
Colonel, USA

JAMES L. POHL
Major, USA

GLENN L. KIRSCHNER
Captain, USA

Appellate Government Counsel
Government Appellate Division

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